(23)

No. 00-1167-CFX Title: Tahoe-Sierra Preservation Council, Inc., et al., Petitioners
v.
Tahoe Regional Planning Agency, et al.

Docketed:
January 19, 2001 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Jan 18 2001	Petition for writ of certiorari filed. (Response due March 20, 2001)
	Feb 12 2001	Order extending time to file response to petition until March 20, 2001.
	Feb 20 2001	Brief amici curiae of National Association of Home Builders and James Nolen filed.
	Mar 1 2001	Waiver of right of respondent Nevada to respond filed.
	Mar 19 2001	Brief amicus curiae of Pacific Legal Foundation filed.
	Mar 20 2001	Brief of respondents Tahoe Regional Planning Agency, et al. in opposition filed.
	Mar 28 2001	Reply brief of petitioners Tahoe-Sierra Preservation Council, Inc., et al. filed.
	Apr 4 2001	DISTRIBUTED for Conference of April 20, 2001
	Jun 26 2001	REDISTRIBUTED for Conference of June 28, 2001
	Jun 29 2001	Petition GRANTED. limited to the following question: "Whether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the Takings Clause of the United States Constitution?" SET FOR ARGUMENT January 7, 2002. **********
	Jul 18 2001	Order extending time to file the joint appendix and petitioners' brief on the merits to and including September 12, 2001.
	Aug 31 2001	Order extending time to file respondent's brief on the merits to and including November 13, 2001.
	Sep 6 2001	Blanket consent to the filing of amicus briefs in support of either party received from counsel for the petitioner and counsel for the respondent.
	Sep 12 2001	Brief amicus curiae of Washington Legal Foundation filed.
	Sep 12 2001	Brief amici curiae of American Farm Bureau Federation, et al. filed.
	Sep 12 2001	Brief amicus curiae of National Association of Home Builders filed.
	Sep 12 2001	Brief of petitioners Tahoe-Sierra Preservation Council, Inc., et al. filed.
	Sep 12 2001	Joint appendix filed.
	Sep 12 2001	Brief amicus curiae of Defenders of Property Rights filed.
	Sep 12 2001	Brief amicus curiae of Institute for Justice filed.
	Sep 12 2001	Brief amici curiae of Pacific Legal Foundation, et al. filed.
	Sep 19 2001	Motion of American Association of Small Property Owners, et al. for leave to file a brief as amici curiae filed.
	Oct 29 2001	Motion of American Association of Small Property Owners,

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No. 00-1167-CFX

Entry	Date	Proceedings and Orders
		et al. for leave to file a brief as amici curiae GRANTED.
	Nov 8 2001	CIRCULATED.
	Nov 9 2001	Brief amici curiae of Council of State Governments, et al. filed.
	Nov 13 2001	Time to file respondents' brief on the merits further extended to and including November 15, 2001.
	Nov 13 2001	Brief amici curiae of American Planning Association, et al. filed.
	Nov 13 2001	Brief amici curiae of Vermont, et al. filed.
	Nov 13 2001	Brief amici curiae of National Audubon Society, et al. filed.
	Nov 14 2001	Brief of respondents Tahoe Regional Planning Agency, et al. filed.
	Nov 15 2001	Brief amicus curiae of United States filed.
	Nov 15 2001	Brief amici curiae of Scientists Thomas Dunne, et al. filed.
	Nov 23 2001	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Dec 10 2001	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Dec 13 2001	Reply brief of petitioners Tahoe-Sierra Preservation Council, Inc., et al. filed.
	Jan 7 2002	ARGUED.

Supreme Court, U.S.
(1)
001167 JAN 18 2001
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

TAHOE SIERRA PRESERVATION COUNCIL, Inc., a California non-profit corporation and membership organization, *et al.*

Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY, a separate legal entity created pursuant to Bi-State Compact, *et al.*

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

LAWRENCE L. HOFFMAN
HOFFMAN LAW OFFICES
3000 No. Lake Boulevard
Post Office Box 7740
Tahoe City, CA 96145
(530) 583-8542

MICHAEL M. BERGER*
GIDEON KANNER
BERGER & NORTON
A LAW CORPORATION
1620 26th Street
Suite 200 South
Santa Monica, CA 90404-4040
(310) 449-1000

**Counsel of Record*
Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

22580

QUESTIONS PRESENTED

1. In light of this Court's clear holding that a temporary moratorium on land use *can* require compensation for a temporary taking of property (*First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 [1987]), is it permissible for the Ninth Circuit Court of Appeals to hold – as a matter of law – that a temporary moratorium can *never* require constitutional compensation?

2. Can a land use regulatory agency escape its constitutional duty to pay for land taken for public use by the expedient of enacting a series of rolling, back-to-back "temporary" moratoria/prohibitions extending over a period of 20 years, and then claiming that each of the individual prohibitions on *all* use must be viewed in isolation from the others and, when so viewed, none was severe enough by itself to cross the constitutional taking threshold?

In similar fashion, can such an agency escape the constitutional obligation of compensation because a court injunction issued in a *different* case barred issuing permits to *other* landowners, while the agency's own regulations precluded all use of the Petitioners' land?

3. Can a land use regulatory agency purport to "protect the environment" at a major regional location (here, Lake Tahoe) by compelling a selected group of individual landowners to forego *all* use of their individual homesites, and thereby compel a *de facto* donation of their land for public use without compensation?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petitioners, in addition to Tahoe-Sierra Preservation Council, Inc., are:

BRUCE A. AMES and JUDITH M. AMES
LAURA L. ANDERSON and JAMES E. ANDERSON
ALFRED J. ANTONINI
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EDWARD ARRI and BARBARA ARRI
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ALPINE INVESTMENT
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THAD WILEY
JEAN WILTFONG
MARIAN H. WINGFIELD
JOHN A. WINN and ELLEN S. WINN
PETER W. WRIGHT and JUNE D. WRIGHT
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To the extent that any of the foregoing are corporations, none has either parents or subsidiaries.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT – Continued

The Respondents are:

Tahoe Regional Planning Agency, a separate legal entity created pursuant to an interstate compact between the States of California and Nevada; the voting members of the governing body of the Tahoe Regional Planning Agency including TONY CLARK, CHESTER A. GIBBS, ALEXANDER HAAGEN, III, STAN HANSEN, THOMAS HSIEH, JAMES KING, ROBERT PRUETT, JAMES S. REED, LARRY SEVINSON, THOMAS STEWART, WILLIAM D. SWACKHAMER, PEGGY TWEDT, RONALD D. WESTERGARD and NORMAN C. WOODS; STATE OF CALIFORNIA; STATE OF NEVADA

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PETITION FOR WRIT OF CERTIORARI

Petitioners Tahoe-Sierra Preservation Council, Inc., *et al.*, respectfully pray that a Writ of Certiorari issue to review a final judgment and order of the United States Court of Appeals for the Ninth Circuit, and to resolve a clear conflict of decision between this Court and the Ninth Circuit, as well as the Ninth Circuit and other courts.

OPINIONS BELOW

The Ninth Circuit Court of Appeals' opinion was filed on June 15, 2000 and is reported as *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 216 F.3d 764 (9th Cir. 2000). (App., p. 1.)[1] The timely Petition for Rehearing was denied, along with the suggestion for Rehearing En Banc, on Oct. 20, 2000. Five active Circuit Judges dissented from the denial of Rehearing En Banc because the panel opinion is in direct conflict with an earlier decision of this Court. The Order and Dissent are published at 228 F.3d 998. (App., p. 156.)[2]

As the five dissenting Judges aptly summarized it:

> "The panel does not like the Supreme Court's Takings Clause jurisprudence very much, so it reverses *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), and adopts Justice Stevens' *First English* dissent." (App., p. 157; 228 F.3d at 999.)

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[1] The Ninth Circuit's opinion affirmed the part of the judgment denying relief to the Petitioners and reversed the part of the judgment granting partial relief. The result of the appellate proceedings is to eliminate any relief to these 449 property owners *for two decades of total regulatory nullification of all economically viable use of their land.*

[2] Judge Kozinski authored the dissenting opinion, joined by Judges O'Scannlain, Trott, T.G. Nelson, and Kleinfeld.

The Jan. 15, 1999 decision of the District Court appears at 34 F.Supp.2d 1226 (D. Nev. 1999). (App., p. 57.) A related opinion dealing with another issue decided by this same appeal appears at 992 F. Supp. 1218 (D. Nev. 1998). (App., p. 128.)

This is the *fourth* decision rendered during the past decade by the Ninth Circuit in these protracted proceedings. The earlier ones (all bearing the same name as the case at bench) appear at: 911 F.2d 1331 (9th Cir. 1990), *cert denied*, 499 U.S. 943 (1991) (referred to in the record as *TSPC I*); 938 F.2d 153 (9th Cir. 1991) (*TSPC II*); and 34 F.3d 753 (9th Cir. 1994), *cert denied*, 514 U.S. 1036 (1995) (*TSPC III*). Some of these decided issues in favor of the Petitioners, but the panel below refused to enforce them. This is thus precisely the kind of major constitutional litigation with widespread implications that warrants closure by a definitive opinion from this Court to settle issues that have bedeviled courts and litigants for more than a decade, and that have caused dissention among appellate Judges.

JURISDICTION

Through a series of rolling moratoria/prohibitions on land development, the Tahoe Regional Planning Agency (TRPA) has kept the 449 individual Petitioners (referred to collectively by their organizational name, Tahoe-Sierra, or simply as the landowners) from making *any* use of their land since 1981,[3] while being required to pay taxes

[3] The Petitioners are all individuals. Their only relationship is that each of them owns a vacant residential lot near Lake Tahoe. These are not commercial developers; these are ordinary individuals who wanted only to build individual homes for their own use.

on their useless land.[4] Among other things, these landowners have been subjected to the same absolute prohibition on development in a "Stream Environment Zone" this Court examined in *Suitum v. Tahoe Reg. Plan. Agency*, 520 U.S. 725 (1997).

Tahoe-Sierra filed this suit in 1984 under the Civil Rights Act, 42 U.S.C. § 1983, seeking compensation for the taking of property effected by this total use prohibition. (Compare *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 [1999] [affirming compensation via § 1983 for a temporary regulatory taking].) After suffering through an agonizingly slow litigational process, the landowners saw their constitutional rights (and their faith in the judicial system) at least partially vindicated when the District Court held in 1999 – 15 years after suit was filed – that TRPA had indeed prevented them from making *any* economically productive use of their land from 1981 to 1984, resulting in a temporary taking of their property and requiring compensation under *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

Following the District Court's extensive findings of fact and its opinion finding TRPA liable for some of the landowners' damages, that court certified the liability issues for appeal (in lieu of holding an immediate valuation trial) and the Court of Appeals accepted them pursuant to 28 U.S.C. § 1292(b). The Ninth Circuit affirmed in part and reversed in part in such a way that all relief was denied. The only thing remaining on remand would be to formalize that death knell.

Though avoiding saying so directly, the Ninth Circuit refused to follow this Court's decision in *First English*. However, as demonstrated in Judge Kozinski's opinion

[4] When the suit was filed, there were nearly 700 plaintiffs. Over the decades, 55 of them passed away and others, exhausted by the litigation, dropped out. After 20 years, 449 continue to fight to protect their constitutional rights.

for the five dissenting Judges, the opinion not only disregarded this Court's holding but, instead, applied Justice Stevens' *dissent* in *First English*.[5] This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment, United States Constitution:

" . . . nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

"Section 1 . . . nor shall any State deprive any person of life, liberty or property without due process of law; . . . "

42 U.S.C. § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Pertinent portions of TRPA's ordinances and regulations are reproduced in the Appendix at p. 168.

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[5] Neither of the other two dissenting Justices in *First English* concurred in this aspect of Justice Stevens' dissent. It may be worth noting that, when this Court reaffirmed and applied *First English* three years later, Justice Stevens followed *stare decisis* and joined the Court's unanimous opinion, rather than reiterate his dissenting views. (*Preseault v. I.C.C.*, 494 U.S. 1 [1990].) He did the same thing more recently in joining the Court's opinion in *Del Monte Dunes*. Apparently, a majority of the Ninth Circuit's active Judges still hews to a dated notion that is no longer endorsed even by its original author.

STATEMENT OF THE CASE

The Petitioners – owners of some 400 individual, lawfully subdivided, single-family residential lots around Lake Tahoe – are mostly married couples who bought their lots years ago to build individual retirement, vacation, or permanent homes for themselves and their families. The lots were all located in partially developed residential neighborhoods with paved roads and utility service. All of the landowners bought their lots many years before the regulations challenged here were even being considered. Their expectation to use their land the same as their neighbors was thus as real as it was reasonable. (Compare *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 [1992] [taking occurred when new regulations prevented buyer of last two undeveloped lots in a subdivision from building].)

However, for the past two decades Petitioners have been prevented from building their homes (or anything else) by a series of rolling prohibitions imposed by the Respondent Tahoe Regional Planning Agency. There were four formal prohibitions, interspersed with informal ones to bridge some gaps, the upshot of which has been a complete prohibition of any use since 1981.

This Court has some familiarity with both TRPA's history and one of the use prohibitions involved here (i.e., no building in a "Stream Environment Zone" [SEZ]) from its recent experience with *Suitum v. Tahoe Reg. Plan. Agency*, 520 U.S. 725 (1997).[6] The same absolute prohibition this Court saw for Mrs. Suitum's SEZ land has been true for the SEZ lands in this case, and for the rest of the

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[6] For earlier litigation in which Justice Stevens wrote for a unanimous Court that TRPA is amenable to suit by landowners under 42 U.S.C. § 1983, see *Lake Country Estates v. Tahoe Reg. Plan. Commn.*, 440 U.S. 391 (1979).

land, too.[7] As the District Court found on ample evidence, the TRPA restrictions precluded all economically beneficial or productive use of the properties now before this Court. (App., p. 99.)[8]

Many have sung the environmental praises of Lake Tahoe;[9] none disputes its glories. It is evidently unique in the depth of its clarity – and therein lies both its blessing and its curse. Because of concerns that the lake's clarity was being degraded by algae being fed by nutrients washing into the lake from areas that were being developed, Congress (in 1969) approved a Compact between California and Nevada that created TRPA to control development around the lake. (App., p. 6.)

The Compact was amended in 1980 to strengthen TRPA's mandate. (App., p. 7.) Thereafter TRPA, evidently heedless of the distinction between regulation and confiscation, began its series of rolling moratoria/prohibitions that has precluded all economically productive use of each of the homesites owned by these 449 landowners ever since.

One thing needs to be clearly said at the outset. These landowners are not contesting TRPA's power to regulate, or even to prevent use of their land to the extent that is necessary to fulfill its mission. Rather, they are contesting only the constitutional legitimacy of TRPA's

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[7] TRPA uses a system of 7 classes to categorize land in its jurisdiction. Classes 1, 2, 3, and SEZ are the most heavily regulated. Each of the parcels at issue here is in one of those classes.

[8] Although it reversed the District Court's legal conclusion that this absolute prohibition resulted in a temporary taking that required compensation, the Court of Appeals expressly left the trial court findings of fact – including this one – undisturbed. (App., p. 40, fn. 30.)

[9] See, e.g., App., pp. 59-60, referring *inter alia* to Mark Twain, President Clinton, and Vice President Gore.

attempt to preclude all productive use *without compensation*.[10] They seek only the compensation the Constitution promises when land regulation goes so far that it becomes a *de facto* taking for an obvious public use.[11] The factual scenario that follows needs to be read with that in mind.

Ordinance 81-5 (App., p. 168) was the first in the unremitting series of rolling prohibitions. Effective Aug. 24, 1981, it prohibited residential use – i.e., the use for which the properties were zoned and for which the landowners intended to use them – in parts of the Lake Tahoe Region involved in this litigation, i.e., lands in Classes 1, 2, 3, and SEZ. The moratorium was to remain in effect until TRPA adopted amendments to the Regional Plan. A year later, on Aug. 26, 1982, TRPA established environmental threshold carrying capacities which would determine the maximum capacity for development of each lot in the area. The Compact required TRPA to complete its work on the Regional Plan within one year of that date. As time passed, TRPA recognized it could not meet that goal, and so, a year later, on Aug. 26, 1983, it adopted Resolution 83-21 (a 90-day temporary moratorium) suspending all permitting activities pending completion of the new Regional Plan. (App., p. 170.)

The 90-day moratorium that rolled on through Resolution 83-21 was not enough, and TRPA informally

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[10] This Court has frequently noted that the underlying substantive validity of governmental action is quite different from the constitutional mandate to pay compensation. See, e.g., *Kaiser Aetna v. United States*, 444 U.S. 164, 174 (1979), and other cases cited *post* at p. 24, fn. 26.

[11] See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, and other cases cited *post* at p. 25, fn. 27. The Tahoe Basin – i.e., TRPA's area of control – contains 501 square miles. The lake itself is 191 square miles. The burden of preservation is plainly a public one that cannot be thrust on the individual owners of a few hundred residentially zoned and subdivided lots. (Compare *Armstrong v. United States*, 364 U.S. 40, 49 [1960].)

allowed it to keep rolling from Nov. 26, 1983 until April 26, 1984, when it finally adopted its new Regional Plan. (App., p. 75.) The 1984 Plan (Ordinance 84-1; App., p. 172) made no change in the use prohibition inflicted on these landowners. Although it appeared to permit development *elsewhere* in the Tahoe Basin, all of the homesites in this litigation remained untouchable. The prohibition simply continued to roll indefinitely.

The State of California (TRPA's staunch ally and defender in this case) sued TRPA when the 1984 Plan was adopted because it felt the parts of the new plan dealing with *other landowners* did not comply with the restrictive/protective demands of the Compact. Shortly thereafter, Judge Garcia of the Eastern District of California enjoined TRPA from approving any building projects. That injunction remained in force until TRPA promulgated another revised Regional Plan in 1987. (App., p. 77.)

But the only effect of Judge Garcia's injunction was to prevent TRPA from allowing those *other* landowners, *not these Petitioners*, to develop their properties. Had there been no such injunction, the 1984 Plan would have precluded all development on Class 1, 2, 3, and SEZ lands anyway. The injunction thus had no impact on these landowners: it "prevented" TRPA from issuing permits to these people, who could not have obtained permits in any event for reasons unrelated to the injunction. In short, the prohibition on use of their properties that had started in 1981 continued on, unabated, through 1987.

And beyond. For these petitioning landowners, the impact of the 1987 Plan was to continue what had gone before. The use prohibitions that had previously been labeled "temporary" simply rolled on. Thus, under none of the various ordinances, resolutions, informal moratoria, or formal plans TRPA issued beginning in 1981, was there anything economically beneficial or productive that these landowners could do with any of their individual homesites. Through this series of rolling enactments, TRPA has effectively blocked construction of their homes for the past two decades and that prohibition has become

permanent. The only thing left for the landowners to do is to continue holding bare legal title to something that cannot be productively used or to sell it at bargain basement prices to entities established by the two states and the federal government for a salvage operation, while paying property taxes and bearing all other obligations of property ownership in the interim.[12]

Procedurally, this case has been a nightmare for the landowners. They have been in litigation for the better part of two decades and have nothing to show for it but the courts' "thinly disguised contempt" for their constitutional rights.[13]

They have been to the Ninth Circuit four times, and before the District Court on countless occasions.[14] In all those hearings, the lower courts refused to acknowledge the unified nature of TRPA's course of action that resulted in a continuous prohibition of all use from 1981 through the present. Thus, as shown by the grid prepared by the

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[12] Because of the impact of TRPA's rolling use prohibitions, the majority of the landowners succumbed and sold their parcels for far less than fair market value to one of these scavenging agencies. The agencies paid only the bare residual value of unusable land. The Petitioners seek the difference so they may be made constitutionally whole, a result similar to the one upheld by this Court in *Del Monte Dunes*.

[13] *TSPC I*, 911 F.2d at 1346 (Kozinski, J., dissenting in part).

[14] This began as two separate suits, one filed in California and one in Nevada, pursuant to the venue provisions of the Compact. After separate District Court rulings resulted in separate Ninth Circuit opinions, the matters were consolidated in the Nevada District Court. A 1998 decision by that court noted that the case had "generated at least seven *published* opinions so far." (App., p. 129; 992 F. Supp. at 1219, fn. 1; emphasis, the court's.) Since then, there have been at least two more District Court opinions, one more Ninth Circuit opinion, and a dissent from the denial of *en banc* reconsideration, swelling the number of published opinions in this Dickensian litigation nightmare to eleven.

Ninth Circuit (App., p. 11), the lower courts sliced and diced TRPA's actions into four pieces and analyzed each piece as though the others did not exist. Slicing TRPA's use prohibitions like so much baloney, the District Court refused to consider the bulk of the time period during which all use was prohibited (1984 through the present) (App., pp. 107-108, 155) – and then the Ninth Circuit eliminated the earlier three years (App., p. 40).

The District Court awarded compensation for a temporary taking for 1981 through 1984, relying on this Court's holdings in *Lucas*, 505 U.S. 1003 for the proposition that a regulation that deprives a landowner of all economically beneficial or productive use is a compensable taking, and *First English*, 482 U.S. 304, for the proposition that a temporary taking during a planning moratorium requires compensation the same as a permanent taking. The District Court denied any compensation for the impact of the 1984 Plan, asserting that it was Judge Garcia's injunction that prevented permits from issuing, not the 1984 Plan. (App., p. 106.)[15] Finally, the District Court denied any relief from the 1987 continuation of the use prohibitions on these lots on the ground that the statute of limitations had run by the time the

[15] This, of course, ignored the indisputable fact that these landowners *could not have obtained permits with or without the injunction*, because the 1984 Plan forbade development on their lots. The injunction prevented TRPA from granting development permits to *other* landowners, not these. As Judge Noonan expressed it at the oral argument of *TSPC III*, "It seems to me this is like a situation where the culprit pushes a person off the top of a high-rise building, and while the body is falling, someone else reaches out a window and shoots a bullet into the falling body." The analogy is apt. By the time the injunction issued, the 1984 plan had already killed the ability of these landowners to use their land. The injunction merely maimed the corpse.

landowners amended their complaints to seek compensation for the effects of the 1987 event.[16]

The Ninth Circuit affirmed insofar as the District Court *denied* relief, and reversed the limited relief the District Court had *granted*. The Ninth Circuit simply refused to follow this Court's decision in *First English*, which held that a temporary planning moratorium could be a taking (albeit a temporary one) that requires compensation for the period when use is forbidden.[17] Although both *First English* and the case at bench involved temporary planning moratoria in effect for a finite period of years, the court asserted that it was "flatly incorrect" that *First English* had any impact here. (App., p. 29.) Then, viewing each period separately, the court held that each of the properties retained substantial value (because the life of property is theoretically infinite and there could be use left at the end of the moratorium) and therefore there could be no taking, even "assum[ing] *arguendo* [in light of the District Court's findings] that the moratorium prevented all development in the period during which it was in effect." (App., p. 34, fn. 20).

[16] This analysis can hold true only if the 1987 Plan is viewed as an entirely separate "event," rather than a continuation of the use prohibition that TRPA had enforced on these lots since 1981. It also required both the District Court and the Ninth Circuit to disregard an earlier Ninth Circuit panel's decision in *TSPC III* (on which both rehearing and certiorari had been denied) that TRPA was wrong on the one statute of limitations issue it pressed fervently and that it had waived the rest. Denial of an *en banc* rehearing deprived the rest of the Ninth Circuit of the opportunity to clear up this internal conflict on its own.

[17] The Ninth Circuit's holding also conflicts with its earlier decisions in *TSPC I* and *TSPC II*, holding that such a temporary taking *could* be found. Denial of an *en banc* rehearing also deprived the rest of the Ninth Circuit of the opportunity to clear up this internal conflict on its own.

Needless to say, the Ninth Circuit's bizarre analysis ignores the fact that, while the "life of the land" may be indefinite, the lives of its mortal human owners are not, and using this approach simply strips human owners of all they own and enjoy. As Justice Holmes put it, the Just Compensation Clause of the Constitution "deals with people, not with tracts of land." (*Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 [1910].) More recently, this Court reaffirmed this concept by stressing that "Property does not have rights. People have rights." (*Lynch v. Household Fin. Co.*, 405 U.S. 538, 552 [1972].)

The landowners' timely Petition for Rehearing and rehearing *en banc* were both denied. (App., p. 157.) Five active Circuit Judges dissented, in an opinion that demonstrates the Ninth Circuit's conflict with *First English*, *Lucas*, and other decisions. Their dissent concludes:

> "The panel's desire to ease local governance does not justify approving means that violate rights secured by the Fifth Amendment as authoritatively interpreted by the Supreme Court." (App., p. 167; 228 F.3d at 1003.)
>
> "By voting not to rehear, we have neglected our duty and passed the burden of correcting our mistake on to a higher authority." (App., p. 157; 228 F.3d at 999.)

REASONS FOR GRANTING THE WRIT

I

WHEN THIS COURT DECIDED *FIRST ENGLISH*, AND HELD THAT A "TEMPORARY" PLANNING MORATORIUM COULD CONSTITUTIONALLY REQUIRE COMPENSATION, IT LEFT NO ROOM FOR LOWER COURTS TO HOLD TO THE CONTRARY

As the five dissenters aptly put it below, the Ninth Circuit "does not like the Supreme Court's Takings Clause jurisprudence very much, so it reverses *First English*. . . . " (App., p. 157; 228 F.3d at 999.) Just so.

In *First English*, this Court examined a temporary planning moratorium that forbade all construction in a recently flooded area, that was in effect for 2½ years, and that was designed to give the County's planners time to determine what uses ought to be permitted and what conditions ought to be placed on construction in a flood hazard area. After the California courts dismissed the case without trial on their theory that – as a matter of law – such action could not be a compensable taking, this Court reversed. This Court concluded that "on these facts the California courts have decided the compensation question inconsistently with the requirements of the Fifth Amendment" (*First English*, 482 U.S. at 311), and that compensation *could* be required under those facts. Surely, the legal principles applied in *First English* would not have led to a different conclusion if the moratorium had consisted of successive monthly freezes, rather than the 2 1/2 year moratorium before the Court.

Here, TRPA enacted a series of moratoria/prohibitions that were longer than those in *First English*, and were designed to prevent all development while planners determined what uses ought to be permitted and under what conditions construction ought to take place. Examining two building prohibitions that were labeled "temporary," the Ninth Circuit concluded that temporary planning moratoria could never – as a matter of law – require compensation. (App., p. 40.) That court defied the *First English* holding.

Just as was done thirteen years ago with the California judiciary, it is time to inform federal Judges who sit in California that their view of compensation for temporary takings is "inconsistent with the requirements of the Fifth Amendment" as well. *First English*, whatever its detractors may say, was not an ideological decision. The six-Justice majority consisted of the Chief Justice along with Justices Brennan, White, Marshall, Powell, and Scalia, a group that spanned the Court's spectrum.

A

First English and *Lucas* Plainly Require Compensation When a Land Use Regulation Prevents All Economically Beneficial or Productive Use For a Temporary Period of Time

The landowners' position is straightforward, and is based primarily on two of this Court's decisions: *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). In *Lucas*, this Court held that a taking occurs when a land use regulation prevents all economically beneficial or productive use. In *First English*, this Court held that – for 5th Amendment purposes – there is *no difference* between a taking for a period of years (i.e., a temporary taking) and a permanent taking of all interests. Both cases bear similarities to this one, in that government agencies were seeking to delay or prevent development in order to advance environmental goals. This Court could not have been more clear that the Constitution protects against uncompensated takings of both kinds – even where the public use behind the regulation is environmental protection.[18]

Lucas involved South Carolina's effort to protect and preserve its shoreline. After all but two lots in an exclusive oceanfront residential subdivision had been built, a new law prevented any further construction. This Court held that the owner of the last two lots was entitled to compensation if the new law precluded all economically beneficial or productive use of his land. As long as the law prevented such use, nothing else mattered. The taking was termed "categorical." (505 U.S. at 1015.) On

[18] "Public use" is coterminous with the exercise of the regulatory police power. (*Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 240 [1984].)

remand, the South Carolina Supreme Court found a temporary taking as a matter of law and ordered compensation. (*Lucas v. South Carolina Coastal Council*, 424 S.E.2d 484 [S.C. 1992].)

First English involved a planning moratorium – the same as here. Following a flood, the county froze development while it studied the situation. After concluding that the remedy for any kind of taking was compensation (482 U.S. at 315), this Court addressed the question whether the length of time involved made any difference. The dissent thought it did. (482 U.S. at 322.) The majority disagreed:

> " . . . 'temporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." (482 U.S. at 318.)

Therefore, held the Court, even though such a holding will undoubtedly impinge on the freedom and flexibility of land use planners (482 U.S. at 321), "invalidation of the ordinance without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy" (482 U.S. at 322). Compensation for the lost use of the property while the moratorium held the land fallow was held constitutionally mandatory.

B

The Ninth Circuit's Holding – That a "Temporary" Planning Moratorium Can *Never* Constitutionally Require Compensation – Is Flatly Contrary to *First English*

The dissenters got it right: the Ninth Circuit doesn't like this Court's takings jurisprudence. Its decisions in this litigation have, bit by bit, undermined these landowners' case. In its first contact with this litigation, the

nominal dissenter in a strange three opinion decision[19] noted that the per curiam opinion appeared to harbor "thinly disguised contempt" for the landowners' plea that their Bill of Rights concerns be accorded the same respect as other Bill of Rights concerns (*TSPC I*, 911 F.2d at 1346).[20] In the final decision in the instant case, the panel went so far as to *de facto* "reverse" decisions of this Court in order to deny relief. But its latest decision simply goes too far in its effort to nullify *First English* and *Lucas*.

To rationalize its deviance from *First English*, the court below concocted a theory it called "conceptual severance" (adding insult to injury, the court said the landowners proposed that theory, when they never had), and concluded that such "severance" of different property interests (here, a taking for a period of years) could not legally be done, i.e., that unless it is a permanent deprivation, it *cannot* be a taking. (App., p. 33.) The short answer to that assertion is that it defies *First English*, where this Court concluded: "Nothing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable." (482 U.S. at 318.) Moreover, government agencies routinely condemn various interests in land for temporary periods. (See *Kimball Laundry Co. v. United States*, 338 U.S. 1 [1949]; *United States v. General Motors*

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[19] *TSPC I*, 911 F.2d 1331, was heard by Judges Fletcher, Reinhardt, and Kozinski. It contains a "Per Curiam" opinion [apparently by Judge Reinhardt, who also authored the opinion below], a "special concurrence" by Judge Fletcher, and a nominal "dissent" by Judge Kozinski, which the dissenter characterized as more of a "disagreement," given the fact that there were not two votes on the issue he disagreed with.

[20] It is more than merely noteworthy that this Court's opinion in *Dolan v. City of Tigard*, 512 U.S. 374 (1994) agreed with Judge Kozinski's analysis by concluding that the property rights protected by the 5th Amendment should not be treated as the "poor relations" of other Bill of Rights guarantees. (512 U.S. at 392.)

Corp., 323 U.S. 373 [1945].) Temporary easements are taken almost daily to facilitate road construction, but no one has ever suggested that the temporary nature of such takings somehow renders them noncompensable.

That the decision below conflicts with *First English* requires little more than comparing it with the *dissent* in *First English*. Although the opinion below never cites the *First English* dissent, it bears what Judge Kozinski called such "an uncanny resemblance" to that dissent (App., p. 160; 228 F.3d at 1000) that it caused him to suggest plagiarism (App., p. 162; 228 F.3d at 1001). Here is what the Ninth Circuit's opinion looks like when compared to the *First English* **dissent**:

First English **dissent**

> "Regulations are three dimensional; they have depth, width, and length. As for depth, regulations define the extent to which the owner may not use the property in question. With respect to width, regulations define the amount of property encompassed by the restrictions. Finally, and for purposes of this case, essentially, regulations set forth the duration of the restrictions. It is obvious that no one of these elements can be analyzed alone to evaluate the impact of a regulation, and hence to determine whether a taking has occurred. . . . [I]n assessing the economic effect of a regulation, one cannot conduct the inquiry without considering the duration of the restriction. . . . Why should there be a constitutional distinction between a permanent restriction that only reduces the economic value of the property by a fraction – perhaps one-third – and a restriction that merely postpones the development of a property for a fraction of its useful life – presumably far less than a third?" (482 U.S. at 330-332.)

"Property interests may have many different dimensions. For example, the dimensions of a property interest may include a physical dimension (which describes the size and shape of the property in question), a functional dimension (which describes the extent to which an owner may use or dispose of the property in question), and a temporal dimension (which describes the duration of the property interest). . . . A planning regulation that prevents the development of a parcel for a temporary period of time is conceptually no different than a land-use restriction that permanently denies all use on a discrete portion of property, or that permanently restricts a type of use across all of the parcel. Each of these three types of regulation will have an impact on the parcel's value. . . . There is no plausible basis on which to distinguish a similar diminution in value that results from temporary suspension of a development." (App., pp. 21, 26, 27.)

The reason the Ninth Circuit went to such lengths to immunize TRPA was that, from the start, the opinion was a goal in search of a justification. The opinion makes no bones about its desire to protect government planning agencies from the consequences of their own decisions. Calling land use planning in general "necessarily a complex, time-consuming undertaking," and the specific tool of a moratorium on development "crucial" to the process,[21] the Ninth Circuit announced that courts should be

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[21] The landowners do not intend to disparage the task of planners in today's regulatory environment. But the complexity of their task is no justification for the excessive delays that frequently are multiples of the time it took this country to fight and win World War II. Moreover, there is simply no justification for protracted, multi-decade bureaucratic delays that have unfortunately become a staple of these cases. (E.g., *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 [1999] [5 years, 5 planning submissions, 19 site plans – all rejected; 18 years of litigation]; *Agins v. City of Tiburon*, 447 U.S. 255 [1980] [It took Mrs. Agins 30 years to finally receive permission to build four homes on her 5-acre parcel] [Charles Gallardo, "After 29 Years, Tiburon House Going Up: Home OK'd But Not For Original Owner," [Marin] Independent Journal, p. B-6, Oct. 21, 1997].)

As noted by knowledgeable commentators who are sympathetic to the regulators, such unfortunate behavior patterns have become common. See Rodney Cobb, *Land Use Law: Marred by Public Agency Abuse*, 3 Wash. U.J.L. & Policy 195 [2000]; Orlando Delogu, *The Misuse of Land Use Control Powers Must End: Suggestions for Legislative and Judicial Responses*, 32 Me. L. Rev. 29 (1980); Melville Branch, *The Sins of City Planners*, 42 Pub. Ad. Rev. 1 (1982).

"exceedingly reluctant" to rule in ways that would "threaten [the moratorium's] survival." (App., p. 28.) And so, instead of performing its historic role as the defender of the Bill of Rights, the court below chose to protect those impinging on the constitutional guarantee. It thought that providing constitutional protection here would provide property owners with a "weapon" to "penalize local communities for attempting to protect the public interest." (App., p. 40.)

That idiosyncratic Ninth Circuit notion goes far toward explaining the result below. It went beyond turning the 5th Amendment's protection of property rights into a "poor relation" of other constitutionally protected rights (see *Dolan*, 512 U.S. at 392); here, the court below declared such rights to be subservient to the wishes of constitutional violators. Takings litigation is not about "penalizing" anyone, any more than complying with the *Miranda* rule is about "penalizing" the community by making it easier for criminals to ply their trade with impunity. Nor when citizens demand enforcement of their Fourth Amendment rights are they wielding a

"weapon" with which to "penalize" the community for its effective law enforcement practices.

Takings litigation is only another instance of "protect[ing] the public interest" by requiring obedience to the Constitution. As Justice Brennan put it, "After all, if a policeman must know the Constitution, then why not a planner?" (*San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 661, fn. 26 [1981] [dissenting, but expressing the substantive views of five Justices].) Neither police officers nor planners are above the law, and requiring them to toe the constitutional mark does *not* "penalize the community." Quite the contrary: it is disregard of the Bill of Rights that penalizes the citizenry.

The Ninth Circuit's erroneous focus on defending all possible planning tools, in order to preserve the flexibility of planners is flatly contrary to *First English*, a conclusion easily drawn by comparing the opinion below with *First English*:

First English

"We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them." (482 U.S. at 321.)

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"In reaching this conclusion, we preserve the ability of local governments to do what they have done for many years – to engage in orderly, reasonable land-use planning through a

considered and deliberative process. To do otherwise would turn the Takings Clause into a weapon to be used indiscriminately to penalize local communities for attempting to protect the public interest." (App., p. 40.)[22]

C

Aside From Its Conflicts With Decisions of *This* Court, the Ninth Circuit's Decision Conflicts With Decisions of Other Lower Courts, Creating Confusion That Requires This Court's Review to Resolve

As if direct conflict with this Court's decisions were not enough, the opinion below conflicts with other lower court opinions as well. For example, in *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 800 (Fed. Cir. 1993), the court acknowledged that, under *First English*, "a taking, even for a day, without compensation is prohibited by the Constitution." Both that conclusion and the one below cannot coexist.

Other courts agree with *Tabb Lakes*. For example, in *Cumberland Farms, Inc. v. Town of Groton*, 247 Conn. 196 (1998), the town denied a variance. Notwithstanding that the property owners retained some use of the service station on their property, the Connecticut Supreme Court held that they could pursue compensation for a temporary taking of their property during the time that it took to litigate the invalidity of the town's denial. The court expressly noted that the town's argument was "contrary to the holding of *First English*. . . . " (247 Conn. at 196.)

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[22] Ironically, it was *precisely* that reasoning of the California Supreme Court in *Agins v. City of Tiburon*, 24 Cal.3d 266, 276-277 [1979], *aff'd on other grounds* 447 U.S. 255 [1980], that this Court branded as an incorrect interpretation of the Fifth Amendment in *First English*, 482 U.S. at 317.

Moreover, to characterize a 20-year process of rolling prohibitions of all uses of the Petitioners' lands as "orderly" and "reasonable" does violence to the English language.

In *Eberle v. Dane County Bd. of Adjustment*, 227 Wis.2d 609 (1999), the county denied an access permit. The Wisconsin Supreme Court held that the owners could pursue compensation for a temporary taking, notwithstanding that they regained full use of their property when that court eventually overturned the permit denial. The court expressly concluded that the county's argument against compensation was contrary to both *First English* and *Lucas*. (227 Wis.2d at 633.)

Likewise, in *Whitehead Oil Co. v. City of Lincoln*, 515 N.W.2d 401 (Neb. 1994), the Nebraska Supreme Court rejected the city's argument that it should not be liable for a temporary taking because all use of the property had not been taken, by referring to "the line of cases which recognizes relief is possible from regulatory takings which do not deprive the owner of all economic use of the property." (515 N.W.2d at 407.) Finally, on remand from this Court's decision in *Lucas*, the South Carolina Supreme Court held that a temporary taking had occurred as a matter of law. (*Lucas v. South Carolina Coastal Council*, 424 S.E.2d 484 [1992].) This, in spite of the fact that Mr. Lucas could still "picnic, swim, camp in a tent, or live on the property in a movable trailer." (*Lucas*, 505 U.S. at 1044 [Blackmun, J., dissenting].)[23]

To the extent that some courts have been convinced to reach a different conclusion,[24] that only emphasizes the

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[23] See also *Sintra, Inc. v. City of Seattle*, 829 P.2d 765, 774 (Wash. 1992) ("a temporary taking is compensable under the Fifth Amendment, and Sintra need not prove that the property remained unusable after the [regulation] was invalidated. [Citing *First English.*]"); *614 Company v. Minneapolis Community Dev. Agency*, 547 N.W.2d 400, 406-407 (Minn. App. 1996) (reduced occupancy of building sufficient to state claim for temporary taking where complaint alleged that remaining uses were not economically viable).

[24] E.g., *Woodbury Place Partners v. City of Woodbury*, 492 N.W.2d 258 (Minn. App. 1992). And, of course, California –

conflict of decision and deepens the need for this Court's intervention. There is a resolute need for clarity in this field which, to date, has been sorely lacking. As a matter of practical reality, all who deal with it are having difficulty. As a recent appraisal commentary summed it up, "there is almost universal consensus in the prodigious takings literature that takings theory is a 'muddle,' 'chaotic,' 'unsatisfactory,' 'unpredictable,' lacking in 'doctrine,' and a 'mess.' " (Walter, *Appraisal Methods and Regulatory Takings: New Directions For Appraisers, Judges, and Economists*, 63 Appraisal J. 331 [1995].) There is no reason to add to that litany, and every reason to rectify it.

II

THE DECISION BELOW UNCONSTITUTIONALLY CONSCRIPTS PETITIONERS INTO PROVIDING PUBLIC OPEN SPACE TO BENEFIT THE PUBLIC WITHOUT COMPENSATION.

In its classic regulatory taking decision, this Court held that "if regulation goes too far it will be recognized as a taking." (*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 [1922] [Holmes, J.].) The question of how "far" is "too far" remains unclear. This case provides the opportunity to clarify the standard significantly.

One guidepost is the precept that the cost of projects benefiting the public should be widely shared:

> "the Fifth Amendment's guarantee that private property shall not be taken for public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice,

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always at the outer edge – believes that litigation to overturn an unconstitutional regulation is merely part of the "normal planning process." (*Landgate v. California Coastal Commn.*, 17 Cal.4th 1006 [1998].) Maybe there. The Wisconsin Supreme Court expressly refused to follow *Landgate* because it conflicts with *First English*. (*Eberle*, 227 Wis.2d at 632, fn. 25.)

should be borne by the public as a whole." (*Armstrong v. United States*, 364 U.S. 40, 49 [1960].)

TRPA has been absolutely clear throughout this process that it forbade the development of the residential homesites bought by these Petitioners in order to gain public benefits. And no one questions that doing so is a proper public goal. Suits such as this one assume that the regulation is for a permissible purpose.[25] This litigation doesn't seek to frustrate the regulation, but only to provide a remedy for its confiscatory impact. This has been the law at least since *Hurley v. Kincaid*, 285 U.S. 95, 103 (1932).[26] The Fifth Amendment:

> "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." (*First English*, 482 U.S. at 315; emphasis, the Court's.)[27]

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[25] For example, the Federal Circuit Court of Appeals (which reviews virtually all takings judgments against the Federal Government) has consistently affirmed judgments making the United States liable for takings that precluded development in order to further proper environmental goals. E.g., *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169 (Fed. Cir. 1990) (surface coal mining); *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994) (limestone mining); *Creppel v. United States*, 41 F.3d 627 (Fed. Cir. 1994) (dredging and filling wetlands).

[26] This Court has consistently so held, in widely varying contexts. E.g., *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984) (trade secrets); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 (1982) (cable TV access); *Kaiser Aetna v. United States*, 444 U.S. 164, 174 (1979) (access to navigable water); *United States v. Security Indus. Bank*, 459 U.S. 70, 75 (1982) (retroactive bankruptcy legislation).

[27] As Justice Breyer expressed it recently, "at the heart of the [Just Compensation] Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing *compensation* for legitimate government action that takes 'private property' to serve the 'public good.' " (*Eastern Enterprises v. Apfel*, 524 U.S. 498, 118 S.Ct. 2131, 2161 [1998] [emphasis in original] [dissenting opinion].) See also *Florida Rock Indus., Inc. v. United States*, 45 Fed. Cl. 21, 24-25 (Fed. Cl. 1999).

TRPA's avowed pursuit of a "free lunch," its goal of creating an open space preserve around Lake Tahoe – but at someone else's expense – is precisely the kind of thing the *Armstrong* principle was designed to deal with. Denying all private use of the subject properties for the public use of enhancing the quality and recreational utility of Lake Tahoe is, on principle, no different than the government's desire to acquire safety zones around airports or approaches to highway bridges. (See *Griggs v. Allegheny County*, 369 U.S. 84, 89-90 [1962].) But either way, the acquisition of such control over *all* use of land adjoining a public facility – whether a lake or an airport – is a *de facto* taking that requires compensation.

The long and the short of it is that TRPA has taken all reasonable, economically productive use of Petitioners' home sites for a public "clear zone" around Lake Tahoe. Just compensation is constitutionally called for. It is irrelevant that TRPA's method was to strip away the use, while leaving title in the Petitioners. As this Court noted generations ago, "[c]onfiscation may result from a taking of the use of property without compensation quite as well as from the taking of the title." (*Chicago, R.I.&P.R. Co. v. United States*, 284 U.S. 80, 96 [1931].) In the words of the New York Court of Appeals, "[t]he only substantial difference . . . between restriction [of all use] and actual taking, is that the restriction leaves the owner subject to the burden of payment of taxation, while outright confiscation would relieve him of that burden." (*Arverne Bay Construction Co. v. Thatcher*, 278 N.Y.2d 222, 232 [1938].)

III

A ROLLING SERIES OF MORATORIA/USE PROHIBITIONS IS FUNCTIONALLY NO DIFFERENT THAN A SINGLE, BLANKET PROHIBITION. THE GOVERNMENT CANNOT EVADE ITS CONSTITUTIONAL OBLIGATION TO PAY COMPENSATION BY SLICING ITS REGULATION INTO BITE-SIZE PIECES

TRPA embarked on a program to deny the landowners all use of their homesites in 1981 and never wavered from that course. Throughout this litigation, they have charged that the totality of TRPA's actions extinguished their ability to build homes on their lots and that compensation was constitutionally mandated. But the courts below treated each of TRPA's acts in isolation from each of the others, as if each had only its own separate existence. In that way, the Ninth Circuit was able to isolate and minimize the impact of each component, and thereby attenuate the overall regulatory scheme.

Nothing in this Court's takings jurisprudence required the Ninth Circuit to use such sliced baloney tactics in examining TRPA's actions. Quite the contrary. When faced with circumstances involving a continuing governmental course of conduct where examination of the entire pattern of conduct was necessary to make a proper constitutional analysis, this Court has opted to examine the conduct as a whole. "A property owner is of course not required to resort to piecemeal litigation or otherwise unfair procedures. . . . " (*MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 350, fn. 7 [1986].)

In *United States v. Dickinson*, 331 U.S. 745 (1947), the government asked this Court to find that a taking occurred at the earliest possible event impairing the property owners' rights (so that the statute of limitations would have run by the time they filed suit). This Court refused the gambit, opting for a practical reading of the just compensation guarantee:

"The Constitution is intended to preserve practical and substantial rights, not to maintain theories. . . . The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding 'causes of action' – when they are born, whether they proliferate, and when they die. . . . The source of the entire claim – the overflow due to rises in the level of the river – is not a single event; it is continuous. And as there is nothing in reason, so there is nothing in legal doctrine, to preclude the law from meeting such a process by postponing suit until the situation becomes stabilized. . . . When dealing with a problem which arises under such diverse circumstances procedural rigidities should be avoided." (*Dickinson*, 331 U.S. at 748-749; citations and internal quotation marks omitted.)[28]

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[28] That *Dickinson* was a physical taking case and the case at bench is a regulatory taking case is irrelevant. This Court has made no such distinction. Rather, in *First English*, the Court showed how all of the law of eminent domain works together – in all its facets, whether direct condemnation or physical or regulatory inverse condemnation, whether permanent or temporary – so that elemental doctrinal features apply across the board. Thus, in its analysis of a temporary regulatory taking, this Court relied on permanent physical inverse condemnation cases (482 U.S. at 316-317), temporary direct condemnation cases (482 U.S. at 318), and cases dealing with the fundamental powers of different branches of government to control the duties entrusted to them by the Constitution (482 U.S. at 319-321). Moreover, constitutional scholars with views as disparate as Professors Richard Epstein and Laurence Tribe agree that the key to finding a taking is the impact of the governmental action on the landowner, not the means by which the injury is inflicted. Compare Richard Epstein, Takings: Private Property and the Power of Eminent Domain 94 (1986) with Laurence Tribe, American Constitutional Law § 9-3 at 593 (2d ed. 1988).

The stabilization concept employed by this Court in *Dickinson* is akin to the concept of a continuing wrong that has been applied in other regulatory taking cases. (E.g., *Gordon v. City of Warren*, 579 F.2d 386, 391 [6th Cir. 1978]; *Lockary v. Kayfetz*, 587 F. Supp. 631, 635-636 [N.D. Cal. 1984], *aff'd* 917 F.2d 1150 [9th Cir. 1990]; *Barbaccia v. County of Santa Clara*, 451 F. Supp. 260, 266 [N.D. Cal. 1978].)[29] The theory of those cases is that, as long as the regulating entity continues to act in furtherance of its policy and goal, then the entity's actions are continuing and the statute of limitations will not run until the last act has become history.

Here, of course, there is no question that TRPA continued to act. It enacted its first use prohibition in 1981, another in 1983, another in 1984, and another in 1987. Each of those acts was but a part of the larger scheme. It should have been evaluated that way below. Otherwise, regulators could routinely evade this Court's decisions in *First English* and *Lucas* by the simple expedient of enacting serial regulations. That cannot have been this Court's intent in *MacDonald, Sommer & Frates*, when it disapproved of forcing property owners into "piecemeal litigation." By so ruling, the Ninth Circuit not only sealed the constitutional injury done by TRPA, it created conflict with each of these other opinions.

Moreover, the decision below erred prejudicially when it decided to immunize TRPA from the destructive effects of its 1984 Plan because the plan was so defective *in other respects* that a District Court enjoined the issuance of permits. Two things are clear, and either should have been enough to impose liability on TRPA for the three years the 1984 Plan's impacts precluded all development.

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[29] All three cases relied on *Dickinson* as support for their holdings.

First, TRPA would not have issued permits to these landowners to build their homes under the 1984 Plan regardless of the presence or absence of an injunction. Under the 1984 Plan, these home sites *could not* be built on. Thus, regardless of the District Court's action, TRPA's own action precluded productive use of these parcels. Second, TRPA's 1984 Plan was the driving force that set it all in motion. But for TRPA's Plan, there would have been no injunction. As the instigator in a series of actions, TRPA's 1984 Plan was a substantial factor causing the landowners' injuries.

As this Court recently concluded, section 1983 actions like this one are tort actions, more specifically, constitutional tort actions. (*Del Monte Dunes*, 526 U.S. at 709.) Under settled tort precepts of causation, the 1984 Plan was a cause of the injunction that prevented TRPA from issuing permits. The landowners, of course, believe the Court need not go that far because the 1984 Plan itself permitted no development on their land. By itself, that is enough for liability.

The same is true of the 1987 Plan. It is merely a continuation of the rest. This Court has already acknowledged that no use of SEZ land was permitted under the 1987 Plan. (*Suitum*, 520 U.S. at 739.) The same, as the courts below acknowledged, is true for the rest of the homesites in this case.

When a continuous course of conduct causes constitutional harm, the instigator of that conduct is constitutionally liable for the harm caused. All of the harm.

CONCLUSION

The Petitioners are ordinary people who, acting in a lawful and constructive manner, have invested their substance and, in some cases, their lives' savings in pursuit of the "American dream" of homeownership. Now, however, they have been told that they cannot build their homes nor use their land for any economically rational

purpose, even as they must pay their property taxes and bear the burdens, duties, and liabilities of land ownership. Their only "right," they are now told, is to suffer foreclosure of their properties, or to sell them at bargain-basement prices to government agencies. The Ninth Circuit has thus held – in plain defiance of this Court's directly on-point holding in *First English* – that the constitutional promise of just compensation is a cruel hoax. To put it in scriptural terms, the Petitioners asked for bread, but the Ninth Circuit gave them stone.

The Petitioners are not some sort of enemy to be mocked with judicial displays of "thinly disguised contempt." They are Americans protected by the Bill of Rights. They have been abused by TRPA and ill-used by the Ninth Circuit. If property rights are not to be a constitutional "poor relation," the Petitioners deserve help from this court, and so does the confusing and contradictory law said to govern this unfortunate field. Perhaps more important, so does the integrity and precedential worth of this Court's *First English* holding.

The Petitioners pray that Certiorari be granted.

Respectfully submitted,

MICHAEL M. BERGER*
GIDEON KANNER
BERGER & NORTON
and
LAWRENCE L. HOFFMAN
HOFFMAN LAW OFFICES

Counsel for Petitioners
**Counsel of Record*

TAHOE-SIERRA PRESERVATION COUNCIL, INC.; Richard A. Allison; Alpine Investment Company, Ltd.; AMCO, Inc.; Jeffrey B. Andersen; Beth C. Andersen; Peter J. Andersen; Janet I. Andersen; Donald F. Archibald; Jean L. Atherton; David E. Baker; Maxine A. Baker; John H. Baker; Pierino C. Barengo, et al., Plaintiff-Appellee-Cross-Appellant,

v.

TAHOE REGIONAL PLANNING AGENCY, a separate legal entity created pursuant to an interstate compact between the States of California and Nevada; the voting members of the governing body of the Tahoe Regional Planning Agency including Tony Clark, Chester A. Gibbs, Alexander Haagen, III, Stan Hansen, Thomas Hsieh, James King, Robert Pruett, James S. Reed, Larry Sevinson, Thomas Stewart, William D. Swackhamer, Peggy Twedt, Ronald D. Westergard and Norman C. Woods; State of California; State of Nevada, Defendant-Appellant-Cross-Appellee.

Nos. 99-15641, 99-15771.

United States Court of Appeals,
Ninth Circuit

Argued and Submitted March 16, 2000
Filed June 15, 2000

E. Clement Shute, Jr. & Ellison Folk, Shute, Mihaly & Weinberger, San Francisco, California, for the defendant-appellant-cross-appellee.

Bill Lockyer, Attorney General of State of California, Richard M. Frank, Chief Assistant Attorney General, J. Matthew Rodriquez, Senior Assistant Attorney General, Daniel L.Siegel, Supervising Deputy Attorney General,

Mary J. Scoonover, Deputy Attorney General, Sacramento, CA, for the defendant-appellant-cross-appellee State of California.

Frankie Sue Del Papa, Attorney General of State of Nevada, William J. Frey, Deputy Attorney General, Carson City, NV, for the defendant-appellant-cross-appellee State of Nevada.

Lawrence L. Hoffman, Hoffman Law Offices, Tahoe City, California, for the plaintiff-appellee-cross-appellant.

Rochelle Nason, League to Save Lake Tahoe, South Lake Tahoe, California, John D. Echeverria, Environmental Policy Project, Georgetown University Law Center, and Thomas E. Roberts, Wake Forest University School of Law, for amici curiae American Planning Association and League to Save Lake Tahoe.

Karl Manheim, Loyola Law School, Los Angeles, California, and Stephen Shane Stark & Alan L. Seltzer, County of Santa Barbara, California, for amici curiae California Cities and California State Association of Counties.

Timothy J. Dowling, Community Rights Counsel, Washington, DC, for amici curiae International Municipal Lawyers Association.

Daniel P. Selmi, Los Angeles, California, for amici curiae Scientists.

Hardy Myers, Attorney General of Oregon, Michael D. Reynolds, Solicitor General of Oregon, and David F. Coursen, Assistant Attorney General of Oregon, Salem, Oregon, for amici curiae States of Oregon, Washington, Arizona, and Montana.

Lois J. Schiffer, Assistant Attorney General, and William Lazarus, David C. Shilton, and Peter H. Oppenheimer, United States Department of Justice, Washington, DC, for amici curiae United States.

Appeals from the United States District Court for the District of Nevada. Edward C. Reed, Jr., District Judge, Presiding; D.C. No. CV-84-00257-ECR.

Before: POLITZ*, REINHARDT, and HAWKINS, Circuit Judges.

REINHARDT, Circuit Judge:

This case involves approximately 450 plaintiffs who own property in the Lake Tahoe Basin. The lead plaintiff, Tahoe-Sierra Preservation Council, Inc. (TSPC), is an association of Tahoe-area property owners. Each individual property owner has alleged, *inter alia*, that each of several land-use regulations enacted in the 1980's by the Tahoe Regional Planning Agency (TRPA) constituted a "taking" of his property under the Fifth and Fourteenth Amendments. The principal question on this appeal is whether a temporary planning moratorium, enacted by TRPA to halt development while a new regional land-use plan was being devised, effected a taking of each plaintiff's property under the standard set forth in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). In addition, we must determine whether any taking that may have occurred following TRPA's adoption of a regional land-use plan in 1984

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* The Honorable Henry A. Politz, Senior United States Circuit Judge for the Fifth Circuit Court of Appeals, sitting by designation.

was attributable to the promulgation of that plan, in light of the fact that the plan was enjoined immediately after it was enacted and was never implemented. Finally, we must decide whether the plaintiffs' claims regarding the successor regional land-use plan enacted by TRPA in 1987 – which did become effective – are time-barred.

FACTUAL BACKGROUND

Lake Tahoe is a large alpine lake located in the northern Sierra Nevada mountains. The lake is unique, both aesthetically and ecologically, because of its size, depth, and the astounding clarity of its water. Indeed, it is one of the clearest large lakes in the world. The unusual clarity of Lake Tahoe results from the fact that it historically was "oligotrophic" – that is, very low in nutrients and lacking a steep temperature gradient that would prevent deep circulation and mixing. Since mid-century, however, the lake has been undergoing "eutrophication," a process by which the nutrient loading in the lake increases dramatically, due to nitrogen and phosphorus (contained in soil) being washed into the lake. The excessive enrichment of the lake by these nutrients encourages the growth of algae. As algal growth in the lake increases, the lake loses its clarity and color, becoming green and opaque. In addition to destroying the water's visual perfection, the algae also depletes its oxygen content, thereby jeopardizing the survival of fish and other lake-dwelling animal life. In short, the eutrophication of the lake is causing serious, and effectively permanent, environmental damage.

The dramatic increase in Lake Tahoe's nutrient levels has been caused by the rapid development of environmentally sensitive land in the Lake Tahoe Basin. The land in the basin drains into the lake, and artificial disturbances of the land – the destruction of vegetation, the creation of impervious objects such as roads and houses, etc. – greatly increase the flow of nutrients into the lake.[1] Of course, the degree to which the development of a particular parcel of land in the basin increases the nutrient flow into the lake depends on the particular characteristics of that property. In general, the development of steeper land leads to more environmental damage, because steeper land is susceptible to more rapid soil erosion. Along with steepness, other land characteristics also affect the amount of damage caused to the lake by development. For example, certain areas near streams and other wetlands, known as Stream Environment Zones (SEZs), act as filters for much of the nutrient loading that runoff carries. Disturbance of SEZ lands can lead to the rapid release of these stored nutrients into the lake. In addition, disturbance of SEZ lands may prevent them from performing their natural filtering function, thereby permitting more of the nutrients contained in runoff from higher elevations to reach the lake. Accordingly, SEZ

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[1] The destruction of vegetation increases the transport of nutrients to the lake in part because vegetation prevents soil erosion. Similarly, the construction of impervious surfaces increases the flow of nutrients to the lake in part because such surfaces prevent rain and snowmelt from seeping into the ground. This increases the surface flow of water, which hastens erosion.

lands are considered especially sensitive to the impact of development.

In an effort to halt the increasing rate of environmental damage to Lake Tahoe, the bi-state Tahoe Regional Planning Compact was approved in 1969 by the United States Congress after being passed by the legislatures of both Nevada and California. The Compact created the Tahoe Regional Planning Agency and set goals for the preservation of the lake and the surrounding basin. Pursuant to the Compact, TRPA adopted land-use Ordinance No. 4, which, among other things, classified the land in the basin according to its susceptibility to environmental damage. Land in the Lake Tahoe Basin was divided into seven "land capability districts," numbered 1 through 7, with 1 being the most environmentally sensitive and 7 the least. Land capability districts 1 through 3 – consisting of the steepest land in the basin – were denominated "high hazard" or "sensitive" lands. SEZ lands were classified as a special subcategory of high hazard lands and were labeled "1b" lands. Land capability districts 4 through 7 were referred to as "low hazard" or "non-sensitive" lands.

For each land classification, Ordinance No. 4 adopted recommendations as to what degree of artificial disturbance the land could safely sustain. There were numerous exceptions to the recommendations, however, and these exceptions caused significant dissatisfaction with TRPA's regulatory scheme. This dissatisfaction, combined with evidence that the 1969 Compact was not strong enough to remedy the problems causing the decline in the basin environment, led to the amendment of the Tahoe

Regional Planning Compact in 1980.[2] In addition to restructuring TRPA and its voting procedures, the 1980 Compact directed TRPA (1) to adopt "environmental threshold carrying capacities" within eighteen months of the date on which the Compact became effective;[3] (2) to adopt a new regional plan within twelve months of the adoption of the carrying capacities; and (3) to review all projects and establish temporary restrictions on development in the basin pending the enactment of a new regional plan.

To comply with the Compact's requirement that it temporarily restrict development pending the enactment of a new regional plan, TRPA enacted Ordinance 81-5, which became effective on August 24, 1981. Among other things, the ordinance temporarily prohibited most residential and all commercial construction on both Class 1-3 and SEZ lands. The ordinance did contain some exceptions to the development moratorium, however, which permitted TRPA to approve construction of some single family homes on Class 1, 2, and 3 lots on the Nevada side of the basin. The ordinance stated that the provisions setting forth the moratorium "shall expire upon the adoption by the agency of Amendments to the Regional Plan."

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[2] The amended Compact took effect on December 19, 1980.

[3] The 1980 Compact defines "environmental threshold carrying capacity" as "an environmental standard necessary to maintain a significant scenic, recreational, educational, scientific or natural value of the region or to maintain public health and safety in the region. Such standards shall include but not be limited to standards for air quality, water quality, soil quality, soil conservation, vegetation preservation and noise."Art. II(i), 94 Stat. 3235.

On August 26, 1982, TRPA adopted environmental threshold carrying capacities. The agency then proceeded with the development of a new regional plan. Due to the tremendous complexity of the task, however, it soon became clear that TRPA would be unable to adopt a new regional plan within twelve months of the adoption of the carrying capacities, as required by the Compact. Concerned that it lacked the authority to issue any building permits after this date without a new regional plan in place, TRPA adopted Resolution 83-21. The Resolution suspended all permitting activities "pending adoption of the new regional plan." This suspension temporarily prohibited the development of all of the covered land. Although the Resolution was drafted to expire after a ninety-day period that ended on November 26, 1983, it was extended, in accordance with its design, until the new regional plan was adopted.

On April 26, 1984, thirty-two months after it had initially suspended development, TRPA adopted a new land-use plan, the 1984 Regional Plan. *See* Ordinance 84-1. On the day of its adoption, the State of California sued TRPA to block the implementation of the plan on the ground that it failed to establish land-use controls sufficiently stringent to protect the Lake Tahoe Basin. The next day, the League to Save Lake Tahoe followed suit and sought an injunction against the plan on the same grounds. The United States District Court for the Eastern District of California, Judge Edward J. Garcia presiding, immediately issued a temporary restraining order prohibiting TRPA from taking any action to approve building projects, and ordered TRPA to show cause why a preliminary injunction should not issue. On June 15, 1984, Judge

Garcia granted a preliminary injunction. We upheld the preliminary injunction on appeal, *see California ex rel. Van de Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1308 (9th Cir.1985), and the injunction remained in force until a completely revised land-use plan – the 1987 Regional Plan – was adopted.

PROCEDURAL HISTORY

After TRPA adopted the 1984 Plan, property owners in Nevada and California filed separate lawsuits. Plaintiffs owning property on the Nevada side of the Tahoe Basin filed an action in the United States District Court for the District of Nevada, and plaintiffs owning property on the California side of the basin filed one in the United States District Court for the Eastern District of California. All of the plaintiffs sought declaratory and injunctive relief, as well as damages, for various violations of the Takings Clause, the Due Process Clause, the Equal Protection Clause, and the Contracts Clause. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 911 F.2d 1331, 1333-34 (9th Cir.1990) (*"TSPC I"*) (Nevada-side suit) (describing the claims in detail); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 938 F.2d 153, 154 n. 1 (9th Cir.1991) (*"TSPC II"*) (California-side suit) (same).

For purposes of litigation, the plaintiffs were divided into two groups: the first was composed of those who own land in areas classified as SEZs, and the second of those who own land in Class 1, 2, and 3 areas. In addition to the land-classification division, the plaintiffs' claims were divided into four time periods: Period I covers

August 24, 1981, to August 26, 1983, the time during which Ordinance 81-5 was in effect; Period II covers August 27, 1983, to April 25, 1984, the time during which Resolution 83-21 was in operation; Period III covers April 26, 1984, to July 1, 1987, the period that ran from the enactment of the 1984 Plan to the enactment of the 1987 Plan; and Period IV covers July 2, 1987, to the present, the time during which the 1987 Plan has been in effect.[4]

The procedural history of the California and Nevada actions, which involves three previous Ninth Circuit opinions, *see TSPC I*, 911 F.2d at 1331; *TSPC II*, 938 F.2d at 153; *Tahoe Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 34 F.3d 753 (9th Cir.1994) ("*TSPC III*"), and several district court opinions, need not be repeated in full. We review here only the three pieces of information regarding the procedural history that are necessary for our resolution of the present appeal.

First, it is important to point out that, at this stage in the litigation, the only claims of the plaintiffs that remain at issue are some of the § 1983 takings claims. The remainder of the claims were dismissed at one point or another. The following table shows the § 1983 takings claims that are before us (the claims are represented by X's):

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[4] Obviously, the plaintiffs' initial complaints, filed in 1984, did not include claims regarding the 1987 Regional Plan. Following remand from *TSPC I* and *TSPC II*, however, the plaintiffs in both actions were permitted to amend their complaints. In their amended complaints, the plaintiffs added claims regarding the 1987 Regional Plan.

		Period I	Period II	Period III	Period IV
Nevada plaintiffs	Class 1-3 plaintiffs		X		X
	SEZ plaintiffs	X[5]	X		X
California plaintiffs	Class 1-3 plaintiffs	X[6]	X	X[7]	X
	SEZ plaintiffs	X	X	X	X

[5] In *TSPC I*, a panel of this court affirmed the dismissal of the Nevada-side, Class 1-3 plaintiffs' Period I claims, concluding that the claims were unripe because the plaintiffs could have applied to TRPA for construction permits under the limited exception contained in Ordinance 81-5. *See TSPC I*, 911 F.2d at 1339; *see also Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 638 F.Supp. 126 (D.Nev.1986). Because this exception was not available for SEZ-classified lands, however, the panel held that the Nevada-side, SEZ plaintiffs' Period I claims were ripe. *See id.* at 1339. In their 1991 amended complaint, the Nevada plaintiffs attempted to reinstate the Class 1-3, Period I claims on the ground that it would have been "futile" for them to seek permits under the limited exception to Ordinance 81-5. The district court rejected this argument, holding that *TSPC I* controlled, and that the plaintiffs should have made their futility argument to the Ninth Circuit in *TSPC I*. *See Tahoe-Sierra Preservation Council, Inc. v. TRPA*, 808 F.Supp. 1474, 1478 (D.Nev.1992). It therefore dismissed those claims once again. *See id.* It appears from *TSPC III* that the plaintiffs did not appeal the district court's ruling. *See TSPC III*, 34 F.3d at 755 (appeal only of statute of limitations and Period III causation issues).

[6] The *TSPC III* court did not dismiss the California-side, Class 1-3 plaintiffs' Period I claims as unripe, because the exception contained in Ordinance 81-5 for case-by-case approval of development, which was available to the Nevada-side Class 1-3 plaintiffs, was not available to the California plaintiffs. *See TSPC II*, 938 F.2d at 156; *supra* note 5.

[7] In *TSPC I*, a panel of this court affirmed the dismissal of the Nevada-side plaintiffs' claims for Period III. There was no majority rationale, however, for the affirmance of the dismissal. *See TSPC I*, 911 F.2d 1336-39 (per curiam) (affirming the dismissal on the ground that the claims were unripe); *id.* at 1343-44 (B. Fletcher, J., concurring) (arguing that the dismissal should be affirmed on the ground that the claims were meritless); *id.* at 1344-47 (Kozinski, J., dissenting in part) (arguing that the claims were ripe); *see also Tahoe-Sierra Preservation Council*, 638 F.Supp. at 131-33 (dismissing the claims as unripe). In *TSPC II*, when confronted with the indistinguishable Period III claims of the California-side plaintiffs, this court reversed the district court's dismissal of those claims as unripe. *See TSPC II*, 938 F.2d at 157 (holding that the claims were ripe, but remanding rather than reaching the merits). While *TSPC II* reached the opposite result from *TSPC I*, the Nevada-side claims were not before *TSPC II*. Consequently, *TSPC II* did not affect the *TSPC I* court's judgment against these claims. Following remand from *TSPC I* and *TSPC II*, the California and Nevada cases were consolidated, and the plaintiffs were permitted to file amended complaints. In their amended complaint, the Nevada plaintiffs attempted to reinstate their Period III claims on the ground that *TSPC II* was the law of the case. The district court rejected this argument, and dismissed those claims once again. The district court held that *TSPC I*'s ruling that the claims be dismissed was also law of the case, and that the district court would follow *TSPC I's judgment* in spite of the inconsistency with *TSPC II's reasoning*. *See Tahoe Sierra Preservation Council, Inc. v. TRPA*, 808 F.Supp. 1474, 1478 (D.Nev.1992). It appears from *TSPC III* that the plaintiffs did not appeal the district court's ruling. *See TSPC III*, 34 F.3d at 755.

To the extent that any of the rulings in *TSPC I* and *TSPC II* are inconsistent, our decision herein renders that fact inconsequential. Even had the Nevada plaintiffs' Period III claims not been dismissed, the plaintiffs would have lost as to those claims on this appeal for the same reasons applicable to the California plaintiffs.

The *TSPC III* court's treatment of the plaintiffs' Period IV claims is the second relevant element of procedural history. Following remand from *TSPC I* and *TSPC II*, the Nevada and California cases were consolidated for further proceedings in the United States District Court for the District of Nevada, Judge Edward C. Reed presiding. The plaintiffs were permitted to amend their complaints and, in doing so, they added the Period IV claims – the claims regarding the 1987 Regional Plan which had been adopted while the litigation was pending. Shortly thereafter, the district court dismissed all of plaintiffs' claims for Periods I, II, and IV, including the § 1983 claims, on the ground that they were all time-barred by a sixty-day statute of limitation provision contained in the 1980 Compact. *See Tahoe Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 808 F.Supp. 1474 (D.Nev.1992) (Nevada case); *Tahoe Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 808 F.Supp. 1484 (D.Nev.1992) (California case). On appeal, this court reversed in part. *See TSPC III*, 34 F.3d 753 (9th Cir.1994). The *TSPC III* court upheld the dismissal of some of the plaintiffs' claims on statute of limitations grounds. *See* 34 F.3d at 755. The court held, however, that the sixty-day statute of limitations period contained in the 1980 Compact did not apply to the plaintiffs' § 1983 claims. *See id.* at 756. Finding that the plaintiffs had "fail[ed] to plead affirmatively any other statute of limitations," the court held that the defendants had forfeited all other statute of limitations defenses. *Id.*

The events of the most recent remand constitute the final element of the procedural history relevant to the present appeal. Following remand from *TSPC III* in 1995,

the parties conducted a year-long settlement effort. Those efforts collapsed in early 1997. The district court then resolved the plaintiffs' remaining claims in two published orders. The first order, issued in early 1998, resolved the plaintiffs' Period IV claims (the claims regarding the 1987 Plan). In it, the district court held that, despite this court's holding in *TSPC III*, the plaintiffs' claims for Period IV were in fact time-barred by the relevant statute of limitations for § 1983 actions in Nevada and California. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 992 F.Supp. 1218 (D.Nev.1998). The second order, published in early 1999 following an eleven-day bench trial, resolved on the merits the issue of liability for the remaining claims.[8] *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 34 F.Supp.2d 1226 (D.Nev.1999). In the order, the district court held, among other things, that: (1) Ordinance 81-5 and Resolution 83-21 were facially invalid because they constituted a categorical taking of the plaintiffs' property, and that TRPA is therefore liable under § 1983 for violating the plaintiffs' Fifth Amendment rights during Period I and Period II; and (2) TRPA is not liable under § 1983 for any taking that may have occurred during Period III,

[8] In accord with the above chart of claims, the district court stated that only the following claims remained to be addressed at the trial: the Period I § 1983 claims of all the California plaintiffs and the Nevada SEZ plaintiffs; the Period II § 1983 claims of all the plaintiffs; and the Period III claims of the California plaintiffs.

because it was the court injunction prohibiting the implementation of the 1984 Plan that barred further development during that period and TRPA's conduct was not the actionable cause of the injunction.

ISSUES ON APPEAL

The defendants appeal the district court's holding that they are liable under § 1983 for a categorical taking during Period I and Period II. The plaintiffs cross-appeal the district court's holding that the defendants are not liable under § 1983 for any taking that occurred during Period III, and the court's holding that the plaintiffs' § 1983 claims for Period IV are time-barred.[9]

DISCUSSION

I. TIME PERIODS I & II

The defendants contend that the district court erred in holding that Ordinance 81-5, which was in effect during Period I, and Resolution 83-21, which was in effect during Period II, constituted categorical takings of each plaintiff's property under the standard set forth in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). As discussed above, these laws were enacted to suspend development in the Lake Tahoe Basin pending the adoption of a new regional land-use plan.

[9] The District Court certified all of these issues for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), and we granted the petition for permission to appeal.

A.

The Takings Clause of the Fifth Amendment prohibits the government from taking "private property . . . for public use, without just compensation." U.S. Const. amend. V. Courts have had little success in devising any set formula for determining when government regulation of private property amounts to a regulatory taking.[10] Thus, the Supreme Court has repeatedly recognized that "whether a particular restriction [amounts to a taking] depends largely 'upon the particular circumstances [of each] case' " – that is, on "essentially ad hoc, factual inquiries." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978); *see also Lucas*, 505 U.S. at 1015, 112 S.Ct. 2886. In this regard, the Supreme Court and lower courts have indicated that most regulatory takings cases should be resolved by balancing the public and private interests at stake, with three primary factors weighing in the balance: (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action. *See, e.g., Penn Central*, 438 U.S. at 124, 98 S.Ct. 2646; *Dodd v. Hood River County*,

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[10] For much of the nation's history, it was generally thought that the Takings Clause reached only the direct appropriation, or the functional equivalent of a "practical ouster of [the owner's] possession." *Transportation Co. v. Chicago*, 99 U.S. 635, 642, 25 L.Ed. 336 (1879). In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922), however, the Supreme Court recognized that government regulation of property could "go[ ] too far" and amount to a taking of that property. *See id.* at 415, 43 S.Ct. 158.

136 F.3d 1219, 1228 (9th Cir.1998); *District Intown Properties Ltd. v. District of Columbia*, 198 F.3d 874, 879 (D.C.Cir.1999).[11]

The Court's evaluation in various cases of the three factors identified in *Penn Central* illustrates that the content of these factors is not amenable to pat description. For example, it is clear that a regulation's "economic effect upon the claimant" may be measured in several different ways. *See Hodel v. Irving*, 481 U.S. 704, 714, 107 S.Ct. 2076, 95 L.Ed.2d 668 (1987) (looking to the market value of the property); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 493-96, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987) (looking to whether the regulation makes the property owner's business operation "commercially impracticable"); *Andrus v. Allard*, 444 U.S. 51, 66, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979) (looking to the possibility of other economic uses besides sale, which was prohibited by the challenged regulation). Similarly, the "character of the governmental action" depends on several things, including whether the action is properly

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[11] In the special context of exactions – land-use decisions conditioning approval of development on the dedication of property to public use – the Supreme Court has developed a different test to determine whether a regulatory taking has occurred. *See Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987). The Court has held that the *Nollan/Dolan* test is inapposite to regulatory takings cases outside the context of excessive exactions. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 703, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999) (overruling in part *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir.1996)).

characterized as a physical occupation of the property, *see Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), and whether the regulation advances a legitimate public purpose, *see Keystone Bituminous Coal Ass'n*, 480 U.S. at 485-6, 107 S.Ct. 1232; *Agins v. Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980).

The Supreme Court has identified two specific circumstances in which it will find a government regulation to constitute a "categorical" taking without performing an ad hoc balancing under *Penn Central*. The first situation involves regulations that compel a property owner to suffer a permanent physical "invasion" or "occupation" of his property. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). In that circumstance, the "character of the governmental action" – ordinarily one of the factors balanced under *Penn Central* – itself becomes sufficient to effect a taking. As the Court held in *Loretto*:

> [A] "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government. . . . [w]hen the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, "the character of the government action" not only is an important factor in resolving whether the action works a taking but also is determinative.

Loretto, 458 U.S. at 426, 102 S.Ct. 3164. The categorical rule applicable to physical invasion cases is clearly not applicable to the present case.

"The second situation in which [the Court] ha[s] found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land." *Lucas*, 505 U.S. at 1015, 112 S.Ct. 2886; *see also Agins*, 447 U.S. at 260, 100 S.Ct. 2138. Here, too, ad hoc balancing is not required because one factor of the *Penn Central* test becomes dispositive. In this instance, it is the "economic impact of the regulation" that becomes determinative: the regulation constitutes a "categorical" taking when it deprives the claimant of "all economically beneficial and productive use of [his] land." *Lucas*, 505 U.S. at 1015, 112 S.Ct. 2886. *Cf. Dodd*, 136 F.3d at 1228.[12]

With respect to Periods I and II, the only question before us is whether the rule set forth in *Lucas* applies – that is, whether a categorical taking occurred because Ordinance 81-5 and Resolution 83-21 denied the plaintiffs "all economically beneficial or productive use of land." *Lucas*, 505 U.S. at 1015, 112 S.Ct. 2886. Below, the district court ruled that the regulations did not constitute a taking under *Penn Central*'s ad hoc approach, but that they did constitute a categorical taking under *Lucas*. *See Tahoe-Sierra Preservation Council*, 34 F.Supp.2d at 1238-45. The defendants appealed the district court's latter holding, but the plaintiffs did not appeal the former. And even if

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[12] As do other courts, we use the term "categorical taking" throughout this opinion as a shorthand reference to government action that is determined to be a "taking" under the categorical approach set forth in *Lucas* (where the "economic impact of the regulation" is determinative). *See, e.g., District Intown Properties*, 198 F.3d at 882-83; *Dodd*, 136 F.3d at 1228. In other words, as with the categorical approach set forth in *Loretto*, it is the approach that is categorical, not the "taking."

arguments regarding the *Penn Central* test were fairly encompassed by the defendants' appeal, the plaintiffs have stated explicitly on this appeal that they do not argue that the regulations constitute a taking under the ad hoc balancing approach described in *Penn Central*. More generally, the plaintiffs do not contest that California's and Nevada's objective of preserving the environmental health and aesthetic beauty of Lake Tahoe is an entirely permissible governmental goal. Nor do they dispute that the restrictions imposed on their properties are appropriate means of securing the purpose set forth in the Compact. In view of the limited nature of the plaintiffs' arguments on appeal, we address our specific inquiry to whether the facts of this case present one of the "relatively rare situations" where "regulation denies all economically beneficial or productive use of land." *Lucas*, 505 U.S. at 1018, 112 S.Ct. 2886.

Our focus is also narrowed by the fact that the plaintiffs bring only a facial challenge to Ordinance 81-5 and Resolution 83-21. In facial takings claims, our inquiry is limited to "whether the mere enactment of the [regulation] constitutes a taking." *Agins*, 447 U.S. at 260, 100 S.Ct. 2138; *see also Keystone Bituminous Coal Ass'n*, 480 U.S. at 493, 107 S.Ct. 1232; *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981); *Garneau v. City of Seattle*, 147 F.3d 802, 807 (9th Cir.1998). For that reason, we look only to the regulation's " 'general scope and dominant features,' " rather than to the effect of the application of the regulation in specific circumstances. *Garneau*, 147 F.3d at 807 (quoting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 397, 47 S.Ct. 114, 71 L.Ed. 303 (1926)); *see also Agins*, 447

U.S. at 260, 100 S.Ct. 2138; *Keystone Bituminous Coal Ass'n*, 480 U.S. at 493, 494, 107 S.Ct. 1232; *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 297, 101 S.Ct. 2352. In this connection, "since it is difficult to demonstrate that [the] 'mere enactment' of a piece of legislation" amounts to a taking, the Court has recognized that facial takings challenges "face an uphill battle." *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 736 n. 10, 117 S.Ct. 1659, 137 L.Ed.2d 980 (1997); *see also Keystone Bituminous Coal Ass'n*, 480 U.S. at 495, 107 S.Ct. 1232; *Garneau*, 147 F.3d at 807.

B.

The plaintiffs contend that, for purposes of determining whether the regulations constitute a categorical taking under *Lucas*, we should not treat the plaintiffs' properties as the fee interests that they are. Instead, they argue, we should define narrowly, as a separate property interest, the temporal "slice" of each fee that covers the time span during which Ordinance 81-5 and Resolution 83-21 were in effect. It is this carved-out piece of each plaintiff's property interest, the plaintiffs assert, that has been "taken" by the regulations.

"Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.' "[13] *Keystone Bituminous Coal Ass'n*, 480 U.S.

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[13] The problem of defining the relevant property interest at stake is commonly referred to as either the "denominator problem" or the problem of "conceptual severance."

at 497, 107 S.Ct. 1232 (quoting Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L.Rev. 1165, 1192 (1967)). In other words, for purposes of determining whether a "taking" of the plaintiffs' "property" has occurred, the proper inquiry is what constitutes the relevant "property"? Is it the fee interest that must be "taken," or is it some lesser unit of property? Property interests may have many different dimensions. For example, the dimensions of a property interest may include a physical dimension (which describes the size and shape of the property in question), a functional dimension (which describes the extent to which an owner may use or dispose of the property in question), and a temporal dimension (which describes the duration of the property interest). At base, the plaintiffs' argument is that we should conceptually sever each plaintiff's fee interest into discrete segments in at least one of these dimensions – the temporal one – and treat each of those segments as separate and distinct property interests for purposes of takings analysis. Under this theory, they argue that there was a categorical taking of one of those temporal segments.

While Supreme Court precedent has not over the years been entirely uniform in its treatment of the conceptual severance question, *compare Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922) (employing conceptual severance) *with Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987) (rejecting conceptual severance in the identical context), most modern case law rejects the invitation of property holders to engage in

conceptual severance, except in cases of physical invasion or occupation. Several cases illustrate the Court's refusal to employ this concept in other types of circumstances. In *Penn Central Transportation Company v. City of New York*, the Penn Central Transportation Company entered into a contract for the construction and lease of an office building above its Grand Central Terminal in New York City. 438 U.S. at 116, 98 S.Ct. 2646. When the City denied two alternate building plans on the ground that they would destroy the architectural appeal of the historic landmark, Penn Central filed suit, claiming that the rejection of the building plans constituted a taking. *Id.* at 117-18, 98 S.Ct. 2646. In affirming the denial of its takings claim, the Court explicitly rejected Penn Central's proposal to consider the airspace above the Terminal as a property interest separate from the rest of the Terminal site. The Court explained:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in *the parcel as a whole* – here, the city tax block designated as the "landmark site."

Id. (emphasis added); *see also MacLeod v. County of Santa Clara*, 749 F.2d 541, 547 (9th Cir.1984).

The Court also refused to employ conceptual severance in *Keystone Bituminous Coal Association v.*

DeBenedictis, which considered the effect of Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act on the property rights of mining companies. As implemented, the Act generally required 50% of the coal beneath certain protected structures to be kept in place as a means of providing surface support. *Id.* at 476-77, 107 S.Ct. 1232. The petitioners, who had purchased both mining rights and waivers for any surface damage caused by mining, argued that the Act constituted a taking. *Id.* at 478-79, 107 S.Ct. 1232. In particular, the petitioners argued that the Act appropriated the portion of coal that they were required to leave in the ground. *Id.* at 497, 107 S.Ct. 1232. They also argued that the Act entirely destroyed the value of each petitioner's "support estate," which is recognized under Pennsylvania law as a separate interest in land. *Id.* In essence, the petitioners argued that there had been a categorical taking of these two distinct property interests.

In holding that the regulation of the petitioners' mining rights did not amount to a taking, the Supreme Court refused to consider the coal that the Act required the petitioners to leave in place as a separate property interest; rather, the Court emphasized, takings jurisprudence must consider the "parcel as a whole." *Id.* at 497-99, 107 S.Ct. 1232. In addition, the Court described Pennsylvania's recognition of a support estate as a "legalistic distinction[ ]" that could not convert the support estate into a separate property interest for takings law purposes. *Id.* at 500-02, 107 S.Ct. 1232.

The Court's general rule against conceptual severance is not limited to the spatial dimension of property rights. In *Andrus v. Allard*, the Court applied its general

rule in a more functional dimension, to the "bundle" of rights that make up what we think of as "property." In that case, federal regulation prohibited the sale of eagle feathers. *Id.* at 53-54, 100 S.Ct. 318. The plaintiffs argued that the denial of the right to sell their feathers constituted a taking. *Id.* at 64 & n. 21, 100 S.Ct. 318. The Court rejected the takings claim, and, in so doing, rejected the conceptual disaggregation of property rights: "[W]here an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety." *Andrus*, 444 U.S. at 65-66, 100 S.Ct. 318 (citing *Penn Central*, 438 U.S. at 130-31, 98 S.Ct. 2646).[14]

In fact, the Supreme Court has already once rejected conceptual severance in the temporal dimension of property rights. In *Agins v. Tiburon*, the city of Tiburon had instituted condemnation proceedings against the plaintiffs' property, but abandoned the proceedings a year later. The plaintiffs brought suit, contending, *inter alia*, "that the city's aborted attempt to acquire the land through eminent domain had destroyed the use of the

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[14] Although *Andrus* demonstrates that individual strands of the property-rights bundle should generally not be treated as separate property interests, the Supreme Court has held that the total abrogation of the "right to exclude" may in certain circumstances constitute a taking because it "will result in an actual physical invasion of the privately owned [property]." *Kaiser Aetna v. United States*, 444 U.S. at 179-80, 100 S.Ct. 383. *Cf. Irving*, 481 U.S. at 716, 107 S.Ct. 2076 (holding, under the special circumstances of that case, that the complete abrogation of the plaintiffs' rights of descent and devise was "similar[ ]" to the denial of the right to exclude invalidated in *Kaiser Aetna*, and thus resulted in a taking).

land during the pendency of the condemnation proceedings." At 258 n. 3, 100 S.Ct. 2138.*Agins*, 447 U.S. The Supreme Court rejected the plaintiffs' claim, holding:

> The State Supreme Court correctly rejected the contention that the municipality's good faith planning activities, which did not result in the successful prosecution of an eminent domain claim, so burdened the appellants' enjoyment of their property so as to constitute a taking. Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. *Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are "incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense."*

447 U.S. at 263 n. 9, 100 S.Ct. 2138 (citations omitted) (emphasis added) (quoting *Danforth v. United States*, 308 U.S. 271, 285, 60 S.Ct. 231, 84 L.Ed. 240 (1939)). In rejecting the takings claim, the Court relied only on the fact that the plaintiffs were able to sell or develop their property after the city abandoned its condemnation claim. By relying on the temporary nature of the restriction, the Court rejected the invitation to carve out, as a separate property interest, a temporal "slice" of the parcel that existed for the time period during which the condemnation proceedings were in progress. For, had the Court considered the plaintiffs' rights in their property during that time period as a separate interest, the plaintiffs' ability to sell or develop their property *after* the time period ended would have been irrelevant to the Court's takings analysis. Only the ability to sell or develop the

property during the condemnation period would have mattered.

Agins's rejection of conceptual severance in the temporal dimension is consistent with the Court's rejection of other forms of conceptual severance in *Penn Central* and *Andrus*. It would make little sense to accept temporal severance and reject spatial or functional severance. A planning regulation that prevents the development of a parcel for a temporary period of time is conceptually no different than a land-use restriction that permanently denies all use on a discrete portion of property, or that permanently restricts a type of use across all of the parcel. *See* Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 Colum.L.Rev. 1667, 1674-78 (1988). Each of these three types of regulation will have an impact on the parcel's value, because each will affect an aspect of the owner's "use" of the property – by restricting *when* the "use" may occur, *where* the "use" may occur, or *how* the "use" may occur. Prior to *Agins*, the Court had already rejected takings challenges to regulations eliminating all "use" on a portion of the property, and to regulations restricting the type of "use" across the breadth of the property. *See Penn Central*, 438 U.S. at 130-31, 98 S.Ct. 2646; *Keystone Bituminous Coal Ass'n*, 480 U.S. at 498-99, 107 S.Ct. 1232; *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384, 397, 47 S.Ct. 114, 71 L.Ed. 303 (1926) (75% diminution in value caused by zoning law); *see also William C. Haas & Co. v. City & County of San Francisco*, 605 F.2d 1117, 1120 (9th Cir.1979) (value reduced from $2,000,000 to $100,000). In those cases, the Court "uniformly reject[ed] the proposition that diminution in property value, standing alone,

can establish a 'taking.' " *Penn Central*, 438 U.S. at 131, 98 S.Ct. 2646; *see also Concrete Pipe and Products, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 645, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993). There is no plausible basis on which to distinguish a similar diminution in value that results from a temporary suspension of development.

To not reject the concept of temporal severance, we would risk converting every temporary planning moratorium into a categorical taking. *See Penn Central*, 438 U.S. at 130, 98 S.Ct. 2646; *Stern v. Halligan*, 158 F.3d 729, 734 (3rd Cir.1998); Michelman, *supra*, at 1193. Such a result would run contrary to the Court's explanation that it is "relatively rare" that government "regulation denies all economically beneficial or productive use of land." *Lucas*, 505 U.S. at 1015, 112 S.Ct. 2886.

More important, the widespread invalidation of temporary planning moratoria would deprive state and local governments of an important land-use planning tool with a well-established tradition. Land-use planning is necessarily a complex, time-consuming undertaking for a community, especially in a situation as unique as this. In several ways, temporary development moratoria promote effective planning. First, by preserving the status quo during the planning process, temporary moratoria ensure that a community's problems are not exacerbated during the time it takes to formulate a regulatory scheme. *See* Elizabeth A. Garvin & Martin L. Leitner, *Drafting Interim Development Ordinances: Creating Time to Plan*, Land Use Law and Zoning Digest, June 1996, at 3, 3; *Schafer v. City of New Orleans*, 743 F.2d 1086, 1090 (5th Cir.1984). Relatedly, temporary development moratoria prevent developers and landowners from racing to carry out

development that is destructive of the community's interests before a new plan goes into effect. Such a race-to-development would permit property owners to evade the land-use plan and undermine its goals. *See id.; Miller v. Board of Public Works*, 195 Cal. 477, 234 P. 381, 388 (1925).[15] Finally, the breathing room provided by temporary moratoria helps ensure that the planning process is responsive to the property owners and citizens who will be affected by the resulting land-use regulations. *See* Robert H. Freilich, *Interim Development Controls: Essential Tools for Implementing Flexible Planning and Zoning*, 49 J. Urb. Law 65, 79 (1971). Absent the pressure of trying to out-speed developers who are attempting to circumvent the planning goals, the "planning and implementation process may be permitted to run its full and natural course with widespread citizen input and involvement, public debate, and full consideration of all issues and points of view." Garvin and Leitner, *supra*, at 3. Given the importance and long-standing use temporary moratoria, courts should be exceedingly reluctant to adopt rulings that would threaten the survival of this crucial planning mechanism.

In opposition to the overwhelming legal and logical support for not conceptually severing fee interests into small temporal pieces, the plaintiffs argue (and the district court below decided) that the Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250

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[15] In fact, there is evidence that such a race-to-develop occurred in the Lake Tahoe Basin in the years preceding the adoption of the 1980 Compact. *See Tahoe-Sierra Preservation Council*, 34 F.Supp.2d at 1241.

(1987), compels such conceptual severance of the property rights in this case. The plaintiffs contend that *First English* holds that conceptual severance of the temporal dimension of property interests is generally required. This argument is flatly incorrect.

First English is not even a case about what constitutes a taking. In *First English*, property owners challenged an ordinance that prevented the development of property located on a flood plain; they sought "damages for the uncompensated taking of all use" of the property. *See id.* at 309, 107 S.Ct. 2378. The California Court of Appeal rejected their claims on the ground that, regardless of whether a taking occurred, the claimants could not recover damages during the period running from the time of enactment of the ordinance to the time when it was finally declared unconstitutional. *See id.* Because the question presented to the Supreme Court related only to the remedy available *once a taking had been proven*, the Court stated explicitly that it was not addressing whether the ordinance constituted a taking. *See id.* at 313, 107 S.Ct. 2378 ("We accordingly have no occasion to decide whether the ordinance at issue actually denied appellant all use of its property. . . . "). According to the Court, it was resolving only the question whether, *once a taking is established*, "abandonment [of that taking] by the government requires payment of compensation for the period of time during which regulations" that constitute a taking are in effect. *Id.* at 318, 107 S.Ct. 2378; *see also Id.* at 311, 107 S.Ct. 2378 (noting that the "disposition of the case [by the California court on the assumption that a taking occurred] isolates the remedial question for our consideration"); Michelman, *supra*, at 1617 & n. 81.

It is true that *First English* holds that, when a *taking* has occurred, the government must compensate property owners, even if the taking is "temporary." Contrary to the plaintiffs' suggestion, however, the Court's holding in *First English* was not that temporary moratoria are "temporary takings." In fact, the opposite is true. The *First English* Court very carefully defined " 'temporary' regulatory takings [as] those regulatory takings which are ultimately invalidated by the courts."[16] 482 U.S. at 310, 107 S.Ct. 2378. What is "temporary," according to the Court's definition, is not the regulation; rather, what is "temporary" is the taking, which is rendered temporary only when an ordinance that effects a taking is struck down by a court. In other words, a *permanent* regulation leads to a *"temporary"* taking when a court invalidates the ordinance after the taking. *See id.* at 319, 107 S.Ct. 2378 ("Invalidation of the ordinance or its successor ordinance after this period of time, though converting the taking into a 'temporary' one, is not a sufficient remedy to meet the demands of the Just Compensation Clause."); *id.* at 317, 107 S.Ct. 2378 (discussing the fact "that the government may elect to abandon its intrusion or discontinue regulations," and thereby turn what would otherwise be a "permanent taking" into a " 'temporary' taking"). The Court's definition, therefore, does not comprehend temporary moratoria, which from the outset are designed to last for only a limited period of time. In short, we reject the plaintiffs' contentions that *First English* applies to temporary moratoria and that it works a radical change

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[16] The Court was careful to include quotation marks around the word "temporary" whenever it referred to a "temporary" taking, in order to make clear that it was using the concept in the specific sense in which it had defined it.

to takings law by requiring that property interests be carved up into finite temporal segments.[17]

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[17] In concluding that *First English* created a categorical rule in favor of temporal severance, the district court relied heavily on the Court's statement in *First English* that it "do[es] not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us." 482 U.S. at 321, 107 S.Ct. 2378. The district court held that the statement amounted to an enumeration of the acceptable forms of planning-related temporary development prohibitions, and that this statement implied the existence of a categorical rule prohibiting temporary development delays caused by regulatory actions other than those listed in the Court's statement. We do not think, however, that the Court intended to create a new categorical rule concerning what constitutes a taking (one that would directly conflict with the principles applied in previous cases) in a passing remark about what the Court "do[es] not deal with." This is especially so in light of the fact that, in *First English*, the Court repeatedly stated that the question whether a taking occurred was not before it. Even were we to accord the Court's dictum some weight, it appears to support, rather than undermine, our position. The list suggests that planning activities that temporarily prohibit development do not constitute takings. There is no suggestion that the list is exclusive. In fact, reading it to be exclusive would require us to draw a constitutional distinction between different conventional planning tools that result in similar development delays. We think such a distinction is untenable. Moreover, even were we to treat the list as exclusive, it appears to encompass temporary planning moratoria. The list allows for "normal delays in obtaining . . . changes in zoning ordinances." 482 U.S. at 321, 107 S.Ct. 2378. The reason that changes in zoning ordinances generally lead to delays and development, however, is that local governments often enact temporary development moratoria during the period in which the new ordinance is being formulated. *See supra* at 777. Thus, even the list itself appears to contemplate temporary development moratoria.

In addition to misinterpreting *First English*, the district court erred in concluding that *United States v. General Motors Corp.*, 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945), and *United States v. Petty Motor Co.*, 327 U.S. 372, 66 S.Ct. 596, 90 L.Ed. 729 (1946), support conceptual severance in the present case. In these cases, the federal government used its power of eminent domain to condemn leaseholds during World War II. Both cases were concerned with the level of compensation owed to the ousted lessees. The fact that just compensation was required in these cases, however, has no bearing on the question before us. Both cases involved the physical occupation by the federal government of the property at issue and thus fall within the categorical rule established by the Court for cases involving physical invasions. As we have explained, physical occupations and appropriations have always received markedly different analytic treatment than other regulatory takings. The Supreme Court has clearly held that the physical invasion or possession by the government of a fragment of a larger parcel constitutes a per se taking – in other words, conceptual severance is the norm. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). Just as *General Motors* and *Petty Motor* require compensation for the government's condemnation of a leasehold, *Loretto* requires compensation for the permanent physical appropriation of a tiny fragment of an apartment building. *See Loretto*, 458 U.S. at 426, 102 S.Ct. 3164. The conceptual severance that is the

norm in these physical appropriation cases, however, does not extend to other regulatory takings claims.[18]

In short, we reject the plaintiffs' suggestion that we engage in conceptual severance. The relevant property interests in the present case are the whole parcels of property that the plaintiffs own.

C.

Having determined that the property interest at stake is just what one would expect it to be – the plaintiffs' fee interests – we must evaluate whether Ordinance 81-5 and Resolution 83-21 effected a categorical taking of each plaintiff's property.[19] For purposes of this analysis, two features of these provisions are relevant. First, the provisions effectively placed a moratorium on the development of the plaintiffs' property.[20] The second relevant

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[18] In fact, in a World War II era case involving a regulation that prohibited the owners of gold mines from using those mines, rather than permitting the government to take possession of the property, the Court found that no taking occurred. *See United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168-69, 78 S.Ct. 1097, 2 L.Ed.2d 1228 (1958).

[19] Although TRPA first passed Ordinance 81-5 and later adopted Resolution 83-21, each regulation was designed to terminate upon the occurrence of the same event – TRPA's adoption of an amended regional plan. Accordingly, we treat the regulations as creating a single temporary moratorium that was designed to and did run from the date on which Ordinance 81-5 became effective to the date on which TRPA adopted the 1984 Plan.

[20] This is actually an overstatement. As the district court noted, both regulations may have permitted certain limited

feature of the provisions is that the moratorium they effected was intended to be temporary – the regulations were designed to institute a temporary moratorium that would remain in effect *only* until a new regional land-use plan could be adopted.[21] *See Union Oil Co. v. Morton*, 512 F.2d 743, 751 (9th Cir.1975) (describing a regulation as temporary if its "termination is conditioned [on] the occurrence of certain future events").

To determine whether the temporary moratorium instituted by TRPA's regulations denies "all economically beneficial or productive use" of the plaintiffs' land, we must first consider the meaning of the phrase "economically beneficial or productive use." The phrase's precise meaning is elusive, and has not been clarified by the

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development, particularly on the Class 1-3 land. *See Tahoe-Sierra Preservation Council*, 34 F.Supp.2d at 1243-44. The district court concluded that these development possibilities were negligible, and did not affect the "takings" calculus. While we have some doubts about the district court's conclusion, the correctness of that conclusion is irrelevant to our analysis. Accordingly, we will assume arguendo that the *moratorium* prevented all development in the period during which it was in effect.

[21] We acknowledge that, given that moratoria are, by definition, temporary, it is redundant to refer to a moratorium as a "temporary moratorium." *See* Webster's Third New International Dictionary 1469 (1976) (defining "moratorium" as a "waiting period set by some authority: a delay officially required or granted"). Nevertheless, because the parties, the district court, and this court have all repeatedly referred to the moratorium at issue in the present case as a "temporary moratorium," and because it emphasizes the temporary nature of the development ban, we use that designation here. *See, e.g., TSPC I*, 911 F.2d at 1339; *TSPC II*, 938 F.2d at 155; *Tahoe-Sierra Preservation Council*, 34 F.Supp.2d at 1248.

Supreme Court. *See, e.g., Lake Nacimiento Ranch Co. v. County of San Luis Obispo*, 841 F.2d 872, 877 (9th Cir.1988). The central confusion over its meaning centers on the relationship between the "use" of property and its "value."[22] Clearly, the economic value of property provides strong evidence of the availability of "economically beneficial or productive uses" of that property.[23]

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[22] *See William C. Haas & Co.*, 605 F.2d at 1120-21 (noting the close relationship between a land-use regulation's effect on the available "use" of a property and the effect on its "value"); *MacLeod*, 749 F.2d at 546 (implicitly noting the same).

[23] Many cases treat the "use" and "value" interchangeably, or speak only of the effect of a regulation on the property's value. *See, e.g., TSPC I*, 911 F.2d at 1335 (suggesting that a "taking" is measured by "diminution of the value of plaintiffs' land"); *Lucas*, 505 U.S. at 1017, 112 S.Ct. 2886 ("What is land but the profits thereof?"); *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 295, 101 S.Ct. 2352 (the "ad hoc, factual inquiries" required under *Agins*'s "viable used" prong "must be conducted with respect to . . . particular estimates of economic impact and ultimate valuation relevant in the unique circumstances"); *MacLeod*, 749 F.2d at 549 ("The determination of whether or not an economically viable use of property remains . . . turns upon the economic impact of the regulation and, particularly, the extent to which the regulations or prohibition has interfered with the distinct investment-backed expectations of the claimant."(citation omitted)); *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 476 (9th Cir.1994), *overruled on other grounds by WMX Technologies v. Miller*, 104 F.3d 1133, 1136 (9th Cir.1997) (en banc) ("In the takings context, the basis of a facial challenge is that the very enactment of the statute has reduced the value of the property or has effected a transfer of a property interest."); *Keystone Bituminous Coal Ass'n*, 480 U.S. at 493, 500-501, 107 S.Ct. 1232; *Suitum*, 520 U.S. at 748, 117 S.Ct. 1659 (O'Connor, J., concurring); *Lucas*, 505 U.S. at 1009, 1010, 1017-18 & n. 8, 1020 & n. 9, 1026 & n. 13, 112 S.Ct. 2886; *Agins*, 447 U.S. at 262, 100 S.Ct. 2138; *Penn Coal*, 260 U.S. at 413, 43 S.Ct. 158; *Concrete Pipe*, 508 U.S. 602, 644, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993).

Nevertheless, there are instances in which certain kinds of "value" may be poor measures of the existence of such uses. In any event, we need not resolve the sticky issues surrounding the meaning and proof of the existence of "economically beneficial or productive uses," because it is clear from the "general scope and dominant features" of Ordinance 81-5 and Resolution 83-21 that the temporary moratorium imposed by these regulations did not deprive the plaintiffs' land in the Lake Tahoe Basin of either all of its "value" or all of its "use."[24] *Garneau*, 147 F.3d at 807.

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[24] The parties disagree over what kind of evidence either party may introduce about the effect of the land-use regulations on specific pieces of property. Before trial, the parties stipulated that, because the action consists only of a facial challenge, "the parties will not introduce evidence regarding the specific factual situations of individual plaintiffs." In spite of this stipulation, the defendants argue on appeal that, even though the plaintiffs brought only a facial challenge, the plaintiffs cannot succeed in proving that a taking occurred without introducing evidence regarding the specific economic impact of the regulations on their individual properties. The defendants' argument that individualized evidence is required is in tension with the pre-trial stipulation. It is also in tension with the statement, made in several cases, that a facial taking challenge "present[s] no concrete controversy concerning . . . [the legal provision's] effect on specific parcels of land." *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 295, 101 S.Ct. 2352. This tension need not be resolved, however, because reference to the general features of the land-use regulations at issue is sufficient to demonstrate that those regulations do not deprive the plaintiffs' property of all use or value.

First, as amici Cities and Counties of California note, basic principles of economics show that the moratorium did not render the plaintiffs' property valueless.[25] *See generally Lucas*, 505 U.S. at 1020, 112 S.Ct. 2886 (assuming, as the basis for its decision, that the regulation at issue rendered Lucas's two beachfront lots "valueless"). The moratorium was temporary – it was designed to and did dissolve upon the adoption of a new regional plan. Given that the ordinance and resolution banned development for only a limited period, these regulations preserved the

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[25] In resolving the question of the remaining value of the plaintiffs' property, the district court relied heavily on *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir.1996). Because the general features of the regulation at issue in the present case make clear that the plaintiffs' property retains value, *Del Monte Dunes*'s discussion of proof of value is irrelevant to our determination. We should note, however, that the district court misread *Del Monte Dunes* in at least two ways. First, the district court ignored the fact that the *Del Monte Dunes* court was reviewing a jury's finding that a taking occurred, and that the *Del Monte Dunes* court thus considered only whether there was sufficient evidence to support the jury's finding. *See* 95 F.3d at 1433. Second, the district court interpreted *Del Monte Dunes* to hold that a "competitive market" is *necessary* to preclude a finding that a taking occurred.However, *Del Monte Dunes* does not stand for so strong a proposition: the *Del Monte Dunes* court held only that, as a matter of law, the presence of a single buyer was *not sufficient* to require the court to upset the jury's finding that a taking had occurred. *See id.* at 1432-33. The only mention *Del Monte Dunes* makes of a "competitive market" is its suggestion that the absence of such a market is a piece of *evidence* that may tend to support a finding of an absence of value. *See id.* at 1433.

bulk of the future developmental use of the property. This future use had a substantial present value.[26]

Of course, were a temporary moratorium designed to be in force so long as to eliminate all present value of a property's future use, we might be compelled to conclude that a categorical taking had occurred. We doubt, however, that a true temporary moratorium would ever be designed to last for so long a period. Certainly, the moratorium at issue here was not. The temporary moratorium was designed to suspend development only until a new regional land-use plan could be formulated – a process that the 1980 Compact intended would take thirty months. While the completion of the regional plan actually took forty months (which led to the temporary moratorium remaining in effect for eight months longer than expected), the moratorium still was in effect for only thirty-two months.[27]

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[26] This economic reality is precisely what differentiates a permanent ban on development, even if subsequently invalidated, from a temporary one. Basic economic theory demonstrates that the present value of land depends on the potential for future use. Accordingly, when a permanent development ban (like the one at issue in *Lucas*) is enacted, the value of the affected land plummets, on account of the fact that the ban bars all future development of the property. In contrast, when a temporary ban is enacted, both the owner of the affected land and any prospective purchasers know that, at a specific point in the future, the moratorium will no longer prohibit the development of the land at issue.

[27] We note that the average time between land purchase and development may be as long as 25 years. *See Tahoe-Sierra Preservation Council*, 34 F.Supp.2d at 1240.

Moreover, there is no evidence that owners or purchasers of property in the basin anticipated that the temporary moratorium would continue indefinitely. Nor would they have had reason to: the district court found that TRPA worked diligently to complete the regional plan as quickly as possible. *See Tahoe-Sierra Preservation Council*, 34 F.Supp.2d at 1250-51. Thus, while the temporary moratorium surely had a negative impact on property values in the basin, we cannot conclude that the interim suspension of development wiped out the value of the plaintiffs' properties.

Furthermore, the temporary moratorium did not deprive the plaintiffs of all "use" of their property. The "use" of the plaintiffs' property runs from the present to the future. (This is a simple corollary of our earlier conclusion that the plaintiffs' property interests may not be temporally severed.)[28] By instituting a temporary development moratorium, TRPA denied the plaintiffs only a small portion of this future stream; the thirty-two months during which the moratorium was in effect represents a small fraction of the useful life of the Tahoe properties.[29]

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[28] This corollary also demonstrates that, had we engaged in conceptual severance, we would have read into the Takings Clause a requirement that the government never interfere with a property owner's wish to put his property to *immediate* use.

[29] Although we need not rely on it, we note that, even during the period of time during which the moratorium was in effect, there were cognizable "uses" to which the basin property could have been put. Although we assume for purposes of our disposition that no development of the property was permitted, *see supra* note 19, "use" includes much more than development. For example, *Lucas* treats the sale of property as an "economically productive use." *See Lucas*, 505 U.S. at 1028, 112 S.Ct. 2886. In addition, we have held that "[h]olding property for investment purposes can be a 'use' of property." *MacLeod*, 749 F.2d at 546 n. 7.

Because the temporary development moratorium enacted by TRPA did not deprive the plaintiffs of all of the value or use of their property, we hold that it did not effect a categorical taking.[30] Indeed, given the above analysis, it is equally clear that the district court was correct to conclude that the moratorium did not constitute a taking under the *Penn Central* test. *See Tahoe-Sierra Preservation Council*, 34 F.Supp.2d at 1240-42. Thus, while the district court was correct as to this latter point, we reverse its holding that a categorical taking occurred. In reaching this conclusion, we preserve the ability of local governments to do what they have done for many years – to engage in orderly, reasonable land-use planning through a considered and deliberative process. To do otherwise would turn the Takings Clause into a weapon to be used indiscriminately to penalize local communities for attempting to protect the public interest.

II. TIME PERIOD III

The plaintiffs raise two issues on cross-appeal, the first of which concerns the district court's holding

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[30] Note that, in so holding, we do not overturn any factual findings made by the district court, only its legal conclusions. Although the district court found that the plaintiffs were denied "all economically beneficial or productive use" of their property, it did so on the basis of its legal conclusion that only substantial developmental uses available *during* the moratorium period were relevant.

regarding Period III – the period after the passage of the 1984 Plan and before the passage of the 1987 Plan.[31] The district court held that TRPA's adoption of the 1984 Plan was not the actionable cause of any deprivation of the plaintiffs' Fifth and Fourteenth Amendment rights that occurred during this period. According to the court, the injunction issued by Judge Garcia against TRPA, in a separate suit brought by the state of California and the League to Save Lake Tahoe, prevented the adoption of the 1984 Plan from being either the "but for" or the proximate cause of any taking that may have occurred during Period III. For this reason, the court held that, as to that period, TRPA could not be held liable under § 1983.[32] On cross-appeal, the plaintiffs argue that the district court erred in concluding that TRPA's actions were not the legal cause of any taking during the period in question.

In a section 1983 action, the plaintiff must demonstrate that the defendant's conduct was the actionable cause of the claimed injury. *See, e.g., Arnold v. IBM Corp.*, 637 F.2d 1350, 1355 (9th Cir.1981). To meet this causation requirement, the plaintiff must establish both causation-in-fact and proximate causation. *See Van Ort v. Estate of Stanewich*, 92 F.3d 831, 837 (9th Cir.1996); *Arnold*, 637 F.2d

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[31] This portion of the appeal concerns only the California-side plaintiffs. *See supra note* 7.

[32] Because the district court concluded that TRPA could not be held liable for any taking that occurred during the 1984-87 period, it did not determine (1) whether the developmental moratorium effected by the injunction actually amounted to a taking, or (2) whether the 1984 Plan, had it been implemented, would have amounted to a taking. We, too, do not decide these questions.

at 1355; *Hoffman v. Halden*, 268 F.2d 280, 295 (9th Cir.1959), *overruled in part on other grounds by Cohen v. Norris*, 300 F.2d 24 (9th Cir.1962). The parties agree that this requirement applies to the plaintiffs' § 1983 claims, which allege a violation of the Takings Clause, as much as it would to any other § 1983 claim.[33] Like other factual determinations, causation-in-fact is reviewed for clear error. In addition, we review findings of proximate cause for clear error, even though they present mixed questions of law and fact. *See Exxon Co. v. Sofec, Inc.*, 54 F.3d 570, 576 (9th Cir.1995) (holding that, although it "is an exception to the general rule that mixed questions of law and fact are reviewed de novo," issues of proximate cause are reviewed under the clearly erroneous standard); *George v. City of Long Beach*, 973 F.2d 706, 709 (9th Cir.1992); *Britton v. Price*, 950 F.2d 602, 604 (9th Cir.1991).[34]

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[33] It is true that there is little discussion of a "causation" requirement in any of the case law involving regulatory takings. *But cf. Penn Central*, 438 U.S. at 124, 98 S.Ct. 2646 (noting, in passing, the proximate cause requirement). However, this is due to nothing more than the fact that, in most regulatory takings cases, there is no doubt whatsoever about whether the government's action was the cause of the alleged taking.

[34] The plaintiffs suggest that, in the absence of sufficient guidance from § 1983 cases or other federal constitutional case law, we should look to state tort law for guidance as to the meaning of proximate cause. The Supreme Court "ha[s] repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability, and ha[s] interpreted the statute in light of the background of tort liability." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999) (citations and internal quotation marks omitted). Nevertheless, there are meaningful differences between § 1983 liability and state tort liability, and these differences may in

The plaintiffs argue on two grounds that the district court clearly erred when it concluded that TRPA's conduct was not the actionable cause of the claimed taking of the plaintiffs' property from 1984 to 1987. First, they argue that the injunction is irrelevant to any consideration of "cause," because the 1984 Plan was actually implemented and itself constituted a regulatory taking.[35] We disagree. Contrary to the plaintiffs' contention, the injunction issued by Judge Garcia effectively prohibited the implementation of the 1984 Plan.[36] The order that granted the injunction read in pertinent part:

> That, until conclusion of trial of this matter, the defendant TRPA, its agents, servants, employees, and all other persons acting under the authority of and in concert with TRPA, hereby are enjoined and restrained from taking

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certain circumstances diminish the relevance of, or warrant departure from, the principles of tort liability. *See Monell v. Department of Social Servs.*, 436 U.S. 658, 693-94, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) (holding that the tort law doctrine of respondent superior does not apply to § 1983 suits brought against local governments). In the present case, we need not rely on any specific state tort case law, because it is clear that under forseeability analysis – which is widely accepted by both federal and state case law as a conventional method of assessing proximate cause – TRPA is not legally responsible for any taking that occurred during Period III.

[35] Although the plaintiffs did not raise this argument until their cross-appeal reply brief, we exercise our discretion to address it on the merits.

[36] Because we conclude that the injunction prohibited the implementation of the 1984 Plan, we need not decide whether the plan, had it been implemented, would have constituted a taking of the plaintiffs' property. *See supra* note 32.

> any action to approve any project, as defined in to [sic] Tahoe Regional Planning Compact, Public Law 96-551, 94 Stat. 3233 (1980), or to approve the construction of any man-made development within the agency's jurisdiction, including the any of the 2,343 developments referred to in the Court's June 15, 1984 opinion, and including the acceptance of applications for such agency approval. . . .

As the district court's order makes clear, the injunction prohibited TRPA from taking "any action" to approve any project, and even prohibited it from accepting permit applications. Without the ability to accept, process, or grant applications, it is impossible to see how TRPA could have implemented the 1984 Plan, the purpose of which was to regulate the granting of new permits.[37] Consequently, as this court pointed out in *TSPC II*, "th[e] plan never went into effect."[38] 938 F.2d at 155. Thus, the 1984 Plan itself could not have constituted a taking.

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[37] The plaintiffs suggest that the 1984 Plan somehow effected a taking in the few days that passed between the time of the plan's adoption and the adoption of the TRO. As Judge B. Fletcher noted in *TSPC I*, however, it would have been impossible for TRPA to implement the plan during these few days, or for the plaintiffs to "complete[ ] all the necessary prerequisites to building, including getting a TRPA permit." *TSPC I*, 911 F.2d at 1344 (B. Fletcher, J., concurring).

[38] The plaintiffs also argue that, even if the plan did not go into effect, the injunction did not "prevent TRPA from providing the Plaintiffs with Just Compensation." The failure to provide such compensation, they assert, is itself an actionable wrong. The plaintiffs' argument skips over the question of liability. If TRPA is not legally responsible for any taking that occurred during Period III, then TRPA has no obligation to provide just compensation to the plaintiffs.

In the alternative, the plaintiffs argue that, even if the 1984 Plan was not itself implemented, TRPA's adoption of the plan effectuated a taking by causing the injunction to issue. Specifically, they contend that (1) the adoption of the 1984 Plan was both a "but for" and the proximate cause of the issuance of the injunction, and (2) the injunction constituted a taking of the plaintiffs' property.[39] For at least two reasons, we reject the plaintiffs' alternative argument.

First, the district court did not clearly err in holding that TRPA reasonably did not foresee that the 1984 Plan would be enjoined. It is well-established that foreseeability analysis is an appropriate part of proximate cause determinations in § 1983 actions. *See, e.g., Arnold,* 637 F.2d at 1355; *Johnson,* 588 F.2d at 743-44. *Cf. Van Ort,* 92 F.3d at 837 (noting that unforeseen, intervening causes break the chain of proximate causation in § 1983 actions). *See generally Palsgraf v. Long Island R. Co.,* 248 N.Y. 339,

[39] Although it is a logically necessary component of their argument, the plaintiffs do not directly support their implicit assertion that the court injunction resulted in a taking of the plaintiffs' property. Their general argument that a taking occurs when a legislative or executive body implements a temporary building moratorium provides indirect support for this position, but the plaintiffs never explain why a temporary moratorium ordered by a *court* should be treated in the same fashion. In fact, there are good reasons to believe that a government action that would otherwise constitute a taking should be treated differently when it is ordered by a court. Moreover, even if a court order could qualify as a taking, it is not clear who, if anyone, would be held liable for that taking under § 1983. Obviously, however, it would ordinarily not be the party that has no choice but to follow the court order.

162 N.E. 99 (1928). Employing such an analysis, the plaintiffs argue that TRPA is legally responsible for the effects of the injunction because TRPA should have reasonably foreseen that it would be sued as a result of its adopting the 1984 Plan. Even if a lawsuit was foreseeable, however, it is the foreseeability of the injunction, not the foreseeability of a lawsuit, that is relevant to proximate causation here. The district court concluded that TRPA reasonably did not foresee that an injunction would issue. *See Tahoe-Sierra Preservation Council,* 34 F.Supp.2d at 1248. The record supports this determination: TRPA sought to adopt a plan that would comply with the Compact, and it had been advised by counsel that its legislative discretion to adopt a plan would be given great deference by the courts; accordingly, it had no reason to believe that it would lose a lawsuit or that the 1984 Plan would be enjoined. Rather than contest this fact, the plaintiffs make the bald assertion that TRPA secretly wanted an injunction against all construction in the basin. However, they point to no evidence in the record to support this contention.

Although TRPA could not have foreseen, prior to adopting the 1984 Plan, that an injunction would issue, the fact that the district court did issue an injunction reveals a second reason why TRPA may not be held legally responsible for any injury that occurred during Period III: in retrospect, there was little TRPA could have done to prevent the injunction. The reason is that "the 'wrongdoing' plaintiffs claim [that TRPA committed] was not the 'wrongdoing' that triggered the injunction." *TSPC I,* 911 F.2d at 1434 (B. Fletcher, J., concurring). The wrongdoing about which the plaintiffs complain was TRPA's

adoption, in 1984, of a regional plan that was *overly restrictive* of development. As Judge Fletcher noted in *TSPC I*, however, "the court granted the injunction based on California's and the League's claim that the Plan *was not strict enough:* it would permit construction of single-family residence [sic] in excess of compact limits and inflict environmental damage, and the Plan also did not abide by the Compact's stricter procedural requirements for project approval." *Id.* (emphasis added). Thus, had TRPA avoided its alleged wrongdoing – by adopting a more lenient plan that met with the plaintiffs' approval – it is even more certain that an injunction would have issued. In short, the lack of a causal connection between the alleged wrongdoing and the purported harm compels the conclusion that TRPA may not be held liable for the effects of the injunction.

For the foregoing reasons, we affirm the district court's holding that TRPA's actions were not the actionable cause of any taking that may have occurred during Period III, and that the defendants therefore may not be held liable as to that period under § 1983.

III. TIME PERIOD IV

The second issue that the plaintiffs raise on cross-appeal concerns the district court's resolution of the claims regarding the 1987 Plan (the Period IV claims). The plaintiffs first added these claims when they amended their complaints in 1991. At that time, the defendants moved to dismiss the plaintiffs' claims for all four time periods on the ground that the claims were barred by the

sixty-day statute of limitations included in the 1980 Compact.[40] The district court agreed as to the claims regarding Periods I, II, and IV, and dismissed those claims.[41] On appeal, we reversed as to the § 1983 claims. We held:

> TSPC . . . brought one claim under 42 U.S.C. § 1983 for the violation of its civil rights by the actions of TRPA in adopting the 1981 Ordinance, the 1983 Resolution, the 1984 Plan and the 1987 Plan. . . . As to § 1983 it is established law that there is a single statute of limitation to be applied. . . . Obviously, the single state statute of limitations to be applied in all § 1983 actions cannot be the special 60-day period provided by the Compact. The defendants did not plead any other statute of limitations except the 60-day one. Failing to plead affirmatively any other statute of limitations, they cannot now rely on any other. No part of TSPC's § 1983 claim is time-barred.

TSPC III, 34 F.3d at 756, *as amended by* 42 F.3d 1306 (citations omitted).

On remand, the defendants asserted in their answers that the plaintiffs' § 1983 claims regarding Period IV,

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[40] Article VI(j)(4) of the 1980 Compact reads as follows:

> A legal action arising out of the adoption or amendment of the regional plan or of any ordinance or regulation of the agency . . . shall be commenced within 60 days after final action by the agency.

[41] The district court dismissed the Period III claims on the ground that the 1984 Plan caused no harm because it had been enjoined. *See TSPC III*, 34 F.3d at 755; *see also supra* text accompanying notes 30-38 (affirming the district court's holding regarding the Period III claims).

while not barred by the sixty-day statute of limitations, were barred by the applicable statutes of limitations – a one-year limit for § 1983 actions in California, and a two-year limit for § 1983 actions in Nevada.[42] *See Tahoe-Sierra Preservation Council*, 992 F.Supp. at 1221. The district court agreed on the merits. In addition, the court held that the law of the case doctrine did not preclude it from holding the plaintiffs' Period IV claims time-barred, even though the *TSPC III* court had concluded otherwise. The district court concluded that it was not compelled to follow *TSPC III* because we had clearly erred in that case when we held that the plaintiffs had forfeited the right to rely on the correct statute of limitations period by failing to "plead" that statute "affirmatively." Accordingly, it dismissed the Period IV § 1983 claims. On cross-appeal, the plaintiffs argue that the district court had no authority to deviate from the law of the case set forth in *TSPC III*. Rather, they contend, only another panel of this court may decline to follow the law of the case established in a disposition of this court.

As an initial matter, we note that the plaintiffs' argument is largely academic. Even were the district court bound absolutely by the holding in *TSPC III*, *we* would still have discretion, under the circumstances present

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[42] Because § 1983 does not contain a statute of limitations, federal courts apply the forum state's statute of limitations for personal injury claims. *See Wilson v. Garcia*, 471 U.S. 261, 276, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985). In California, the applicable statute of limitations is one year. *See Johnson v. California*, 207 F.3d 650, 653 (9th Cir.2000). In Nevada, the applicable statute of limitations is two years. *See Perez v. Seevers*, 869 F.2d 425, 426 (9th Cir.1989).

here, to decline to follow the law of that case. In addition to being academic, however, the plaintiffs' argument may well be incorrect. In *United States v. Cuddy*, 147 F.3d 1111 (9th Cir.1998), we held that the district court did not abuse its discretion when it declined to follow, on remand, a holding we had issued on appeal. *See id.* at 1114-15. We concluded that the district court had acted within its discretion because it was correct in determining that our holding was clearly erroneous. *See id.* In addition to our holding in *Cuddy*, we have suggested in dicta on several occasions that district courts may, in certain circumstances, decline to follow law of the case set forth by this court. In fact, one of our standard formulations of the law of the case doctrine includes subordinate, as well as coordinate, courts: "Under the doctrine of law of the case, 'a court is generally precluded from reconsidering an issue that has already been decided by the same court, *or a higher court* in the identical case.' [However,] a court may have discretion to depart from the law of the case where [certain features are present.]" *Rebel Oil Co. v. Atlantic Richfield Co.*, 146 F.3d 1088, 1093 (9th Cir.1998) (emphasis added) (quoting *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir.1997)); *see also Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 833 (9th Cir.1982). *But cf. Thomas v. Bible*, 983 F.2d 152, 155 (9th Cir.1993) (suggesting, in dicta, that the "level or levels of the court or courts involved" has some bearing on a court's discretion to deviate from law of the case).

While our case law appears to support the authority of a district court to deviate from the law of the case in appropriate circumstances, we do not decide whether such circumstances existed in this case. Instead, we reach

the same decision as the district court on the alternate ground that, regardless of the district court's authority to decline to follow the law of the case established by this court in *TSPC III*, we have the discretion to do so and we exercise that discretion here. The law of the case doctrine provides that a panel of this court has discretion to depart from the law of the case established by the same panel, or another, where: "(1) the decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial." *Jeffries v. Wood*, 114 F.3d 1484, 1489 (9th Cir.1997) (en banc) (footnote and internal quotes omitted).[43] The holding in *TSPC*

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[43] For some time, there have existed in the Ninth Circuit two different formulations of the set of circumstances in which a court may decline to follow the law of the case. The first formulation, set forth in a line of cases that includes *Jeffries*, states that a court may depart from the law of the case if "the [previous] decision is clearly erroneous *and* its enforcement would work a manifest injustice." *Jeffries*, 114 F.3d at 1489 (emphasis added); *see also Leslie Salt Co. v. United States*, 55 F.3d 1388, 1392 (9th Cir.1995). In contrast, the second formulation states that a court may decline to follow the law of the case if "the first decision was clearly erroneous" *or* "a manifest injustice would otherwise result." *Cuddy*, 147 F.3d at 1114; *see also United States v. Alexander*, 106 F.3d 874, 876 (9th Cir.1997); *Russell v. Commissioner of Internal Revenue*, 678 F.2d 782, 785 (9th Cir.1982). While one might have expected that *Jeffries*, being an en banc decision, would control all future cases, at least three post-*Jeffries* cases cite the disjunctive formulation, which is inconsistent with *Jeffries*. *See United States v. Scrivner*, 189 F.3d 825, 827 (9th Cir.1999); *Cuddy*, 147 F.3d at 1114; *Disimone v. Browner*, 121 F.3d 1262, 1266 (9th Cir.1997).

III falls squarely into the first category: the decision was "clearly erroneous and its enforcement would work a manifest injustice." *Id.*

In order to understand why the holding in *TSPC III* is clearly erroneous, one must first understand what it is that *TSPC III* held. In concluding that the defendants had forfeited their right to argue at any point in the litigation that the plaintiffs' § 1983 claims were time-barred, the *TSPC III* court stated: "The defendants did not *plead* any other statute of limitations except the 60-day one. Failing to *plead affirmatively* any other statute of limitations, they cannot now rely on any other." *TSPC III*, 34 F.3d at 756 (emphasis added). On appeal, the plaintiffs argue that the court used the term "plead" in its non-technical sense, to mean simply "argue" or "contend." We think it evident, however, that the court used the term in its conventional legal sense, to mean "assert in a pleading." Both courts and lawyers know that the term "plead," when used in a legal context, has that meaning. When a court uses the term in an opinion, therefore, we presume, in the absence of evidence to the contrary, that the court meant to employ the standard legal meaning. Here, there is no

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Recently, we noted this conflict – which appears to have gone unrecognized in previous case law – but did not resolve it. *Mendenhall v. NTSB*, 213 F.3d 464(9th Cir.2000). As in *Mendenhall*, we need not resolve the conflict in the present case. For, as the following discussion demonstrates, there are grounds here to depart from the law of the case set forth in *TSPC III* under the more stringent *Jeffries* standard as well as under the more popular disjunctive standard. (Of course, any case that meets the *Jeffries* standard a fortiori meets the disjunctive standard.)

indication to the contrary. Quite the opposite: the adverb that the *TSPC III* court used in conjunction with the term "plead" bolsters our reading. In rejecting the affirmative defense, the court did not merely state that the defendants had failed to "plead" the proper limitation period; instead, it stated that the defendants had failed to "plead affirmatively" the proper period. This more specific term – "plead affirmatively" – makes it even clearer to us that the *TSPC III* court used the term "plead" in its legal rather than popular sense. After all, the statute of limitations defense at issue in *TSPC III* is an affirmative defense – a type of defense that, in legal parlance, must be "plead affirmatively." For these reasons, we conclude that *TSPC III* held that the defendants forfeited their right to argue another limitations period by failing to assert that period *in a responsive pleading*.

Given our conclusion about what *TSPC III* held, it follows that *TSPC III*'s holding was clearly erroneous. At the time that we heard the appeal in *TSPC III*, none of the defendants had ever filed an answer, or any other type of responsive pleading. *See TSPC*, 992 F.Supp. 1218, 1223 (D.Nev.1998). Instead, in response to both the original complaints and the amended complaints, the defendants had filed motions to dismiss. A motion to dismiss is not a pleading. *See* Fed.R.Civ.P. 7(a) (designating "pleadings"); *Miles v. Department of Army*, 881 F.2d 777, 781 (9th Cir.1989) ("[A] motion to dismiss the complaint is not a responsive pleading."). Thus, it was not until the remand following *TSPC III*, when the defendants filed answers to the plaintiffs' complaints, that the defendants finally

"pled."[44] And in those first responsive pleadings, the defendants pled the pertinent statutes of limitations for the § 1983 claims. Accordingly, *TSPC III* clearly erred in holding that the defendants failed to "plead affirmatively" those statutes.

In addition to the clear factual error, *TSPC III*'s bare legal holding – that the defendants forfeited the correct statute of limitations defense – is clearly wrong. The defendants raised the correct limitations periods in their answers. The inclusion of the defense in an answer is sufficient to preserve the defense. *See Magana v. Northern Mariana Islands*, 107 F.3d 1436, 1446 (9th Cir.1997); Fed. R. Civ. Pro. 8(c). In fact, we have permitted defendants to raise affirmative defenses for the first time well after filing an answer, *see Magana*, 107 F.3d at 1446, and have also permitted district courts to raise an affirmative defense sua sponte, so long as the defense has not been affirmatively waived, *see Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 686-87 (9th Cir.1993).

Although it is true that, prior to filing their answers, the defendants had asserted, by way of a motion to dismiss, a statute of limitations defense premised on a mistaken choice of law, the defendants' mistake does not in any way constitute a waiver of all other limitations periods. *See Zotos v. Lindbergh Sch. Dist.*, 121 F.3d 356, 361 (8th Cir.1997) (rejecting argument that defendant waived application of 90-day limitation period by relying only on a two-year limitation period in its summary judgment

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[44] Of course, it is understandable that the panel in *TSPC III* might not have realized that, ten years into the litigation, the defendants had not yet actually answered the complaints.

motion); *Yoder v. Honeywell Inc.*, 104 F.3d 1215, 1224 n. 3 (10th Cir.1997) ("We hold that [the defendant] did not waive the statute of limitations defense simply by pleading the defense based on the wrong choice of law.") *Cf. Daingerfield Island Protective Soc'y v. Babbitt*, 40 F.3d 442, 444-45 (D.C.Cir.1994).[45]

In addition to being clearly erroneous, *TSPC III*'s holding would result in a manifest injustice were we to follow it. *Jeffries* held that a court may find that an erroneous decision works a manifest injustice if "the challenged decision . . . involve[s] a significant inequity or the extinguishment of a right. . . . " *Jeffries*, 114 F.3d at 1492. In the present case, the clear error in *TSPC III* would lead to a significant inequity. Were we to follow *TSPC III*'s erroneous holding, the defendants would lose their opportunity to present this dispositive defense – a defense that fully vindicates their right to be free from a trial and an adverse damage award. Of course, depriving a defendant of a statute of limitations defense might not always be significantly inequitable. Here, however, the defendants did nothing that would have misled the plaintiffs or constituted a forfeiture of that defense. In marked

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[45] The plaintiffs suggest that if a defendant raises a particular time bar in a motion to dismiss, it must raise all potential time bars in that motion. This argument is clearly incorrect. Some time bars may be resolved on such a motion and others may not. For example, a time bar that turns on the resolution of factual disputes may only be resolved at a later stage of the litigation. It would make little sense to require defendants with multiple potential time bar defenses, some of which may be subject to resolution on a motion to dismiss and some of which may not, to raise all of those defenses at the very outset of the proceeding.

contrast, the plaintiffs failed to bring their claims regarding the 1987 Plan until more than four years after the plan became effective, which is more than two years after Nevada's statute of limitations had run, and more than three years after California's. These circumstances, combined with the fact that the defense is both timely and dispositive, convince us that the requisite inequity exists in the present case.

Because the time bar holding in *TSPC III* is clearly erroneous and would be manifestly unjust if enforced, we decline to follow it. On the merits, the district court held the plaintiffs' claims time-barred, and the plaintiffs affirmatively decline to argue on appeal that the district court's resolution of that question is incorrect. Even when asked by this court at oral argument, the plaintiffs stressed that they disputed only the district court's authority to deviate from the law of the case set forth in a disposition of this court. Their decision not to argue the merits of the time-bar issue is not surprising, given that they filed the Period IV claims years after the relevant statutes of limitations had run. Because the plaintiffs offer no argument on the merits of the timeliness of their Period IV claims, we affirm the district court's dismissal of those claims.

AFFIRMED in part and REVERSED in part. REMANDED for entry of judgment in favor of defendants in accordance with this disposition.

TAHOE-SIERRA PRESERVATION COUNCIL, INC., et al., Plaintiffs,
v.
TAHOE REGIONAL PLANNING AGENCY, et al., Defendants.

No. CV-N-84-257-ECR.

Jan. 15, 1999.

Lawrence L. Hoffman, Law Offices of Lawrence L. Hoffman, Tahoe City, CA, Stephanie L. Williams, Sacramento CA, for Plaintiffs.

Daniel E. Lungren, Atty. Gen. of the State of Cal., Richard M. Frank, Asst. Atty. Gen., Daniel L. Siegel, Supervising Deputy Atty. Gen., Mary J. Scoonover, Deputy Atty. Gen., for Defendant State of Cal.

Frankie Sue Del Papa, Atty. Gen. of State of Nevada, William J. Frey, Deputy Atty. Gen., for Defendant State of Nevada.

Susan E. Scholley, E. Clement Shute, Jr., Ellison Folk, J. Thomas Susich, for Defendant Tahoe Regional Planning Agency.

FINDINGS OF FACT, CONCLUSIONS OF LAW, and ORDER

EDWARD C. REED, Jr., District Judge.

On December 1, 1998, after fourteen and a half years of litigation, the first phase of the trial in this action finally began. The case involves approximately 449 plaintiffs who own property in the Lake Tahoe Basin. The lead plaintiff, Tahoe-Sierra Preservation Council, Inc.

("TSPC"), is an association of Tahoe area property owners. Each of the individual plaintiffs has alleged that several ordinances enacted in the early 1980s by the defendant, Tahoe Regional Planning Agency ("TRPA"),[1] effected takings of his or her property under the Fifth and Fourteenth Amendments to the United States Constitution. Given the complexity of the case, as well as the sweeping changes in the law of regulatory takings that have occurred in the past fifteen years, it is, while unfortunate, not surprising that the case has been pending for so long. The first ten years or so were spent largely in an effort to determine whether any of the claims in the case were justiciable at all.

Clearly, however, the effort expended in this case – by all the parties and by the courts – has not been wasted. The dispute here is not over something trivial or unimportant. For what is at stake, at least in part, is the survival of Lake Tahoe, one of the wonders of the natural world. Whatever the ultimate outcome of this case, the fate of the lake deserves serious attention and thought. That, it has unquestionably received. The very tenacity with which the property owners herein have pursued their claims supports the idea that the lake is worth

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[1] We note here that while both the states of Nevada and California have continued to act as if they were still defendants in the case, all claims against both states were actually dismissed long ago. Nonetheless, since most of TRPA's funding comes from the two states, and thus any judgment rendered against TRPA may have an impact on the states, and there being no objection by the plaintiffs, we allowed attorneys representing both states to participate in the trial, and generally to continue in the case.

fighting for. Were the Tahoe Basin not such a beautiful, desirable place to spend time, it is doubtful that the plaintiffs would have pursued their claims quite as vigorously, or in quite the same manner, as they have done over the years.

Unsurprisingly, a case pending for such a long period of time picks up something of a history along the way. Here, that history consists, in part, of three published Ninth Circuit opinions, at least five published district court opinions, and numerous unpublished district court orders. These orders and opinions have significantly narrowed and defined the scope of this case. Of course, many of these opinions also set forth versions of the facts, or some of the facts, involved in the case. We do not find it appropriate merely to refer to earlier statements of the facts, however, given that those statements were largely prepared in ruling on motions to dismiss or motions for summary judgment, where certain assumptions are made that may not always find themselves borne out by the evidence produced at trial. We thus present a complete discussion of the facts herein; we base our findings on the evidence and testimony presented at trial, and the stipulations agreed to by the parties.

FINDINGS OF FACT

Lake Tahoe, the dominant presence in this litigation, is a remarkable alpine lake located in the northern Sierra Nevada mountains. The lake is almost indescribably beautiful. Nonetheless, many have tried to describe it – the most notable of whom (and certainly the most quoted, at least during this trial) is Mark Twain. Twain, while

famous for his hyperbole, cannot be said to have exaggerated the beauty of Lake Tahoe, which he described as:

> a noble sheet of blue water lifted six thousand three hundred feet above the level of the sea, and walled in by a rim of snow-clad mountain peaks that towered aloft full three thousand feet higher still! . . . As it lay there with the shadows of the mountains brilliantly photographed upon its still surface I thought it must be the fairest picture the whole earth affords.

Mark Twain, *Roughing It* 169 (facsimile reprint of 1st ed., Hippocrene Books, n.d.) (1872). Further, the lake:

> was glassy and clear, or rippled and breezy, or black and storm-tossed, according to Nature's mood; and its circling border of mountain domes, clothed with forests, scarred with landslides, cloven by canons and valleys, and helmeted with glittering snow, fitly framed and finished the noble picture. The eye was never so tired of gazing, day or night, in calm or storm; it suffered but one grief, and that was that it could not look always, but must close sometimes in sleep.

Id. at 173.

Others, too, have attempted to describe the beauty of the lake, including sources more commonly cited in judicial opinions than Mark Twain. These include the Supreme Courts of California and Nevada, and even the President and Vice President of the United States. In July of 1997, President Clinton and Vice President Gore both attended the "Lake Tahoe Presidential Forum" in Incline Village, Nevada, on the northeast shore of the lake. The President referred to Lake Tahoe as "one of the crown

jewels, unique among them all. It's a national treasure that must be protected and preserved." Sean Whaley, *Clinton Pledges Tahoe Aid*, Las Vegas Rev.-J., July 27, 1997, at 1A. The Vice President stated that, "There is a peace associated with Lake Tahoe that is very, very special. . . . The beauty of this place is unique in all the world." Sean Whaley, *Gore Vows to Protect Lake*, Las Vegas Rev.-J., July 26, 1997, at 1A. The Nevada Supreme Court called the lake a "national treasure," *Kelly v. Tahoe Reg'l Planning Agency*, 109 Nev. 638, 855 P.2d 1027, 1034 (1993), and the California Supreme Court referred to the Basin as "an area of unique and unsurpassed beauty." *People ex rel. Younger v. County of El Dorado*, 5 Cal.3d 480, 96 Cal.Rptr. 553, 487 P.2d 1193, 1194 (Cal.1971). The plaintiffs, quite wisely, do not dispute the fact that Lake Tahoe is uniquely beautiful.

Ironically, the more Lake Tahoe comes to be appreciated for its beauty, the more that beauty is threatened. Part of what makes Tahoe so special is the amazing clarity of its water, which, as a result of its clarity, is an unusually beautiful cobalt blue color. Again, we revert to Mark Twain for a description. He described the clarity of Tahoe's water as follows:

> So singularly clear was the water, that where it was only twenty or thirty feet deep the bottom was so perfectly distinct that the boat seemed floating in the air! Yes, where it was even *eighty* feet deep. Every little pebble was distinct, every speckled trout, every hand's-breadth of sand . . . . Down through the transparency of these great depths, the water was not *merely* transparent, but dazzlingly, brilliantly so. All objects seen through it had a bright, strong vividness,

> not only of outline, but of every minute detail, which they would not have had when seen simply through the same depth of atmosphere. So empty and airy did all the spaces seem below us, and so strong was the sense of floating high aloft in mid-nothingness, that we called these boat-excursions "balloon-voyages."

Twain, *Roughing It* 174-75 (emphasis in original); *see also* Mark Twain, *Innocents Abroad* 262-265 (Harper & Brothers 1911) (1869) (comparing Lake Tahoe to Italy's Lake Como). Most lakes lack anything approaching this clarity, usually because of the presence of algae growing in their depths. Algae requires a nutrient-rich environment in which to grow, and most lakes contain sufficient amounts of the requisite nutrients to feed considerable algal growth. Not so Lake Tahoe, however, which has historically been lacking in both nitrogen and phosphorous, two of the nutrients algae requires. A lake which is deficient in such plant nutrients, like Tahoe, is "oligotrophic."

Unfortunately, this is rapidly changing. The clarity of the lake has been decreasing by at least a foot a year. As algal growth in the lake increases, its clarity decreases. In other words, the lake undergoes what is termed "eutrophication." Eutrophication is the process of becoming more "eutrophic," which, at least as it relates to a lake, is defined as "rich in dissolved nutrients. . . . " Webster's Third New International Dictionary 786 (1976). Eventually, unless the process is stopped, the lake will lose its clarity and its trademark blue color, becoming green and opaque for eternity. Or at least, for a very, very long time. Estimates are that, should the lake turn green, it could

take over 700 years for it to return to its natural state, if that were ever possible at all.

The increase in algal growth, and the attendant loss in water clarity, is caused by an increase in the amounts of nitrogen and phosphorous reaching the lake. The evidence clearly shows that this increase in nutrient levels is caused by increased development in the Lake Tahoe Basin ("the Basin"). Dramatic decreases in clarity first began to be noted in the late 1950s/early 1960s, shortly after development at the lake began in earnest in the 1950s. Clarity has decreased steadily since then. Even today, increased algal growth is more noticeable in areas of the lake near larger concentrations of human habitation and development.

Increased development causes increased nutrient loading of the lake largely because of the increase in impervious coverage of land in the Basin resulting from that development. Impervious coverage – such as asphalt, concrete, buildings, and even packed dirt – prevents precipitation from being absorbed by the soil. Instead, the water is gathered and concentrated by such coverage. Larger amounts of water flowing off a driveway or a roof have more erosive force than scattered raindrops falling over a dispersed area – especially one covered with indigenous vegetation, which softens the impact of the raindrops themselves. Apparently, even the force of a raindrop falling on bare earth has some erosive power, which the presence of vegetation mitigates. Thus disruptions to the natural plant cover caused by development further exacerbate the problem. The increase in impervious coverage seems to be a larger problem than the loss of plant cover, however – perhaps because so much of the

Basin's precipitation falls in the form of snow. One can only assume that a snowflake impacts the ground with less force than a raindrop. Yet runoff from the melting snow still produces erosion.

The concentrations of water running off areas of impervious coverage then flow rapidly over areas of uncovered earth, picking up nutrient-rich topsoil and bits of vegetation and debris as they go. The increase in runoff thus causes more debris and soil – and hence more nitrogen and phosphorous – to reach the lake than under natural conditions. Generally speaking, the steeper the slope, the more runoff will occur. Thus areas with steeper slopes are usually considered "high hazard" lands.

Of course, there is always some naturally occurring runoff. Normally, however, much of the runoff from upper elevations never reaches the lake. Instead, certain areas near streams and other wetlands – known as Stream Environment Zones ("SEZs") – act as filters for much of the debris that runoff carries. When SEZ lands are filled in and paved over, however, they cease to perform their natural function. Thus not only do the paved-over SEZ lands increase erosion due to the new impervious coverage, they also fail to mitigate erosion occurring at higher elevations farther from the lake. SEZ lands are therefore considered especially sensitive to the impact of development.

The most obvious response to this problem, of course, is to restrict development around the lake – especially in SEZ lands, as well as in areas already naturally prone to runoff. Given the high desirability of the Tahoe

Basin as a place to live and to vacation, however, restrictions on development, when they were imposed, were not well-received by all parties involved. Of course, if no one wanted to live there, no restrictions on development would have been necessary – leading the California Supreme Court to remark, almost thirty years ago, that "the region's natural wealth contains the virus of its ultimate impoverishment." *People ex rel. Younger v. County of El Dorado*, 5 Cal.3d 480, 96 Cal.Rptr. 553, 487 P.2d 1193, 1194 (1971). Clearly, though, people do want to live there – or at least vacation there. More people come to Lake Tahoe every year. While this classic struggle between development and the environment has been played out all over the country, the Tahoe area has seen some particularly epic battles of this kind.

The developing environmental problems at the lake first received significant attention in the 1960s. Given that two states, five counties, several municipalities, and the federal government (which, through the U.S. Forest Service, owns a large percentage of the land in the Basin) have jurisdiction over part of the lake or the surrounding area, the need for some type of coordinated response to the problem was obvious. Thus in 1969, the bi-state Tahoe Regional Planning Compact was approved by the United States Congress, after being passed by the legislatures of both Nevada and California. Pub.L. No. 91-148, 83 Stat. 360; 1967 Cal. Stat. ch. 1589, p. 3804, § 1, *amended by* 1968 Cal. Stat. ch. 988, p.1900, § 1; 1968 Nev. Stat. 4. The Compact created the defendant TRPA, and set goals for the preservation of the lake and the surrounding Basin.

Pursuant to the Compact, TRPA adopted, in 1972, Ordinance No. 4, a Land Use Ordinance which incorporated what is commonly known as the Bailey system. TRPA Ordinance No. 4, §§ 5.00, 6.00 (Defs.' Ex. 201). The Bailey system, named for its developer, Robert G. Bailey, classifies land in the Tahoe Basin according to how prone to environmental damage it is. *See generally*, Robert G. Bailey, Forest Service, U.S. Dept. of Agriculture, *Land-Capability Classification of the Lake Tahoe Basin, California-Nevada: A Guide for Planning* (1974) (Defs.' Ex. 203). Generally speaking, land with steeper slopes is naturally more prone to runoff, so even slight disturbances in vegetation or increases in land coverage can result in large increases in nutrient runoff. Bailey thus divided land in the Basin into seven "land capability districts," based largely on steepness, but also taking into account flood hazard, high water tables, poorly drained soils, landslides, fragile flora and fauna, and soil erodibility. These land capability districts are numbered 1 through 7, with 1 being the most environmentally sensitive, and 7 the least (relatively speaking). Each land capability district was assigned a land coverage coefficient – a recommended limit on the percentage of such land that could be covered by impervious surface. The coefficients are as follows:

land capability districts 1 and 2	1%
land capability district 3	5%
land capability district 4	20%
land capability district 5	25%
land capability districts 6 and 7	30%

Generally, land capability districts 1 through 3, because of the higher risk of erosion associated with these areas, are

grouped together and denominated "high hazard" or "sensitive" lands, while land capability districts 4 through 7 are referred to as "low hazard" or "non-sensitive" lands. (Actually, Bailey himself grouped them slightly differently, but that is how TRPA grouped them for planning purposes, and how they have been grouped throughout this litigation.) On average, "Class 1-3 lands" are the steepest lands in the Basin. SEZ lands constitute a special category of high hazard lands, and are classified as "1b" lands – sort of a subsection of land capability district 1. While SEZ lands are generally much less steep than other district 1 lands, they are nonetheless extremely sensitive, due to the nature of the function they perform when left in their natural state, as discussed above. Throughout, we refer to "Class 1-3 lands" and "SEZ lands" separately; although technically the term "Class 1-3" could be read to include SEZ (or 1b) lands, for clarity we have defined the term to exclude SEZ lands.

However, although Ordinance No. 4 adopted the Bailey system, it allowed numerous exceptions to the coverage recommendations. The building of new residential housing was not particularly limited. This led to significant dissatisfaction with TRPA's regulatory scheme. It became evident that the environment was continuing to decline, and that the 1969 Compact was not strong enough to fix the problem. California became so dissatisfied that it pulled its funding from TRPA, and its own agency, the California Tahoe Regional Planning Agency (formed in 1967, prior to the adoption of the Compact), began to impose stricter regulations on that part of the Basin lying within California.

Eventually, this dissatisfaction led to the amendment of the Tahoe Regional Planning Compact in 1980. Pub.L. No. 96-551, 94 Stat. 3233; 1980 Cal. Stat. ch. 872, p. 2710, § 2, codified at Cal. Gov't Code § 66801; 1980 Nev. Stat. 1, codified at N.R.S. 277.200 (the "1980 Compact"). The 1980 Compact restructured TRPA and its voting procedures, and directed it to establish environmental threshold carrying capacities and a new regional plan within a strict time table. The amended Compact became effective December 19, 1980; TRPA was required to adopt threshold carrying capacities within 18 months of that date, and a new regional plan within 12 months of the adoption of the carrying capacities. In addition, the amended Compact required that TRPA review all projects, and established temporary restrictions on development in the Basin pending the enactment of a new regional plan.

In addition to the requirements of the Compact, TRPA was faced with the need to develop a regional water quality plan, or 208 plan, as required by the EPA under the Clean Water Act, 33 U.S.C. § 1288 (1986). Although TRPA had proposed a 208 plan in 1979, California had rejected it, and agreement on a plan had still not been reached by the time the Compact was amended. Thus at the same time TRPA was grappling with the new Compact requirements, it was still embroiled in debate over the 208 plan. The plaintiffs have pointed to the fact that TRPA expended resources during the time immediately following the Compact's amendment on an (ultimately successful) attempt to develop a 208 plan, and have claimed that this is some kind of evidence that TRPA acted in bad faith in complying with the Compact requirements. This argument is completely meritless.

TRPA was under an obligation to development a 208 plan, and the agency clearly approached its obligations under both the Compact and the Clean Water Act with good faith and to the best of its ability. In addition, we note that much of the work done in preparing the 208 Plan was also necessary to the development of the regional plan, specifically the establishment of the threshold carrying capacities required by the Compact.

However, it is primarily the agency's response to the amended Compact that, inevitably, set this litigation in motion. On February 26, 1981, TRPA adopted Ordinance 81-1, which elaborated on what was meant by the term "project," as defined in the Compact. The Compact defined "project" as "an activity undertaken by any person, including any public agency, if the activity may substantially affect the land, water, air, space or any other natural resources of the region"; required all "projects" to be approved by TRPA; and directed the agency to "prescribe by ordinance those activities which it has determined will not have a substantial effect on the land, water, air, space or any other natural resources in the region and therefore will be exempt from its review and approval." 1980 Compact, Article II(h), Article VI(a)-(b). In other words, TRPA was required to identify what were *not* projects. This TRPA did in Ordinance 81-1. In relevant part, 81-1 made clear that the construction of new, single-family homes in "critical areas" (defined to include Class 1-3 lands and SEZ lands) was considered a "project" (subject to a minor exception for certain already approved subdivisions). TRPA Ordinance 81-1, § 3 .12 (Defs.' Ex. 217). Thus Ordinance 81-1 made it clear that, for the most part, owners of Class 1-3 and SEZ lands were

required to get a permit from TRPA before beginning construction of homes on their property.

Then, several months later, TRPA adopted Ordinance 81-5, the first of the three actions actually challenged in this case. The ordinance was enacted on June 25, 1981, with an effective date of August 24, 1981. TRPA Ordinance 81-5, § 16.00 (Defs.' Ex. 227). Even the defendants have admitted that Ordinance 81-5 "temporarily prohibit[ed] most residential and all commercial construction on land capability districts 1, 2, 3 and SEZs until a new regional plan was developed." Defs.' Tr. Br. at 13. Ordinance 81-5 actually amended the existing regional plan, referred to by its implementing ordinance, Ordinance No. 79-10. First, Ordinance 81-5 amended § 12.00 of Ordinance 79-10, entitled "Regulation of Development on High-Erosion and High-Runoff Hazard Lands." The amended section 12.00 provided that land in capability districts 1 through 3 (excluding SEZ lands) would be subject to a classification review, which came to be known as "case-by-case" review. The amendments to § 12.00 went on to provide that:

> Except as otherwise provided by this ordinance, no person shall perform any construction, work, use or activity, including without limitation, grading, clearing, removal of vegetation, filling or creation of land coverage, upon land within land capability districts 1a, 1c, 2 and 3 without first obtaining a permit from the Agency. The application for such a permit shall be reviewed and approved as a "project" pursuant to the Compact and the Rules and Regulations of Practice and Procedure of the Agency. . . .

TRPA Ordinance 81-5, § 2.20 (amending § 12.21 of Ordinance 79-10). Although specific findings were required for approval of any application that would result in land coverage in excess of the Bailey coefficients, such excess coverage was permitted. The coverage limitations in force were actually those set forth in § 9.24 of the Land Use Ordinance, or Ordinance No. 4 (Defs.' Ex. 201), or "twenty percent (20%) of the area of the pertinent lot or parcel, whichever is less." TRPA Ordinance 81-5, § 2.20 (amending § 12.23 of Ordinance 79-10). The coverage limitations of § 9.24 of Ordinance No. 4 were less restrictive than the Bailey coefficients. New commercial land coverage, on the other hand, was restricted to amounts consistent with the Bailey coefficients, at least in land capability districts 1-3 and SEZ lands. TRPA Ordinance 81-5, § 2.20 (amending § 12.40 of Ordinance 79-10). Further, § 12.60 was amended to read as follows:

> Except as otnerwise provided by this ordinance, and subject to the exceptions set forth in this subsection, no person shall perform any grading, clearing, removal of vegetation, filling or creation of land coverage upon land within land capability districts 1a, 1c, 2 and 3.

TRPA Ordinance 81-5 (amending § 12.60 of Ordinance 79-10). The exceptions referred to included already approved subdivisions, public works projects, areas already so modified by man that the land capability characteristics had been fundamentally changed ("man-modified areas"), approved erosion control work, and "outdoor recreation facilities." *Id.* Finally, the amendment provided for administrative challenges to land capability district classifications.

As to SEZ lands, the amendments provided for much more strict prohibitions on development:

> Notwithstanding any other provision of this ordinance or of any other ordinance of the Agency, no person shall perform any grading, clearing, removal of vegetation, filling or creation of land coverage, within or upon a stream environment zone ("SEZ"), as described or depicted upon maps contained in the Plan.

TRPA Ordinance 81-5, § 3.00 (amending § 13.00 of Ordinance 79-10). Further,

> Notwithstanding any other provision of this ordinance or of any other ordinance of the Agency, no person shall perform any construction, work, use or activity upon a lot or parcel containing an SEZ without first obtaining a permit from the Agency, the application for which permit shall be reviewed and approved as a "project". . . . Such application shall not be approved unless it is found by the Agency that it proposes no grading, clearing, removal of vegetation, filling or creation of land coverage within the SEZ. . . .

Id. The only exceptions for SEZ lands are for certain public works projects, man-modified areas, and approved erosion control work. Again, however, administrative challenges to a property's classification were allowed.

The other relevant provisions of Ordinance 81-5 deal with its applicability. On a first reading, the provisions of the ordinance that allow for the possibility of some construction in Class 1-3 lands appear to apply to all land in the Basin. *See* TRPA Ordinance 81-5, § 10.00 (amending

§ 20.00 of Ordinance 79-10). However, § 20.20 of Ordinance 79-10 was amended to continue in effect certain listed provisions of the California State Water Resources Control Board's Lake Tahoe Water Quality Plan, with respect to the California side of the Basin. Those provisions essentially barred new development in California on SEZ lands – or anywhere in excess of the Bailey coefficients. Defs.' Ex. 211. The final provision of Ordinance 81-5 that concerns us now relates to its effect date, which was defined as sixty days after the date of its adoption. TRPA Ordinance 81-5, § 16.00. As the ordinance was adopted on June 25, 1981, it became effective on August 24, 1981.

The effect of Ordinance 81-5 as to SEZ lands was thus to prohibit any construction, work, use or activity that involved any form of grading, clearing, removal of vegetation, filling or creation of land coverage – with or without a permit. Uses or activities that did not involve grading, clearing, removal of vegetation, filling or creation of land coverage appear to have been allowed – if a permit was obtained. The plain language of the ordinance thus seems to imply that even hiking or picnicking on SEZ land in its natural state would require a permit, although it is hard to imagine that TRPA would have enforced the ordinance so literally. These restrictions appear to be effectively the same in both Nevada and California.

As to Class 1-3 lands, however, there is a significant difference between Nevada and California. In Nevada, the provisions of Ordinance 81-5 allowed for construction, work, uses or activities, including those that involved grading, clearing, removal of vegetation, filling

or creation of land coverage – including land coverage in excess of the Bailey coefficients – so long as a permit was obtained. Permits for such activities were obtainable, provided that certain findings were made. In California, however, no coverage in excess of the Bailey coefficients was allowed. As on SEZ lands, however, the language of the ordinance indicates that *nothing* could be done without a permit. For Class 1-3 lands, however, this might have been somewhat modified by Ordinance 81-1, which provided for "minor grading" without a permit.

After the adoption of 81-5, which also implemented some details of the final 208 plan, TRPA turned its attention more completely to the task of developing threshold carrying capacities as mandated by the Compact. From the date Ordinance 81-5 was adopted, TRPA had approximately one year remaining under the Compact's schedule in which to develop carrying capacities. "Environmental threshold carrying capacity" was defined by the 1980 Compact as "an environmental standard necessary to maintain a significant scenic, recreational, educational, scientific or natural value of the region or to maintain public health and safety within the region." 1980 Compact, Article II(i). Faced with a complex task and a divided Governing Board, it is unsurprising that TRPA did not quite meet the Compact deadline of June 19, 1982. Instead, threshold carrying capacities were adopted on August 26, 1982, roughly two months behind schedule – which, given the circumstances, was not terrible. TRPA Resolution No. 82-11 (Defs.' Ex. 244).

Under a liberal reading of the Compact, TRPA then had one year from the adoption of the thresholds in which to adopt a new regional plan – or until August 26,

1983. Unfortunately, but again not surprisingly, no regional plan was in place as of that date. Worried that, once the Compact's time limit had been exceeded, TRPA had no jurisdiction to continue issuing construction permits, the agency took the second of the three actions challenged here – it adopted Resolution 83-21, which completely suspended all project reviews and approvals, including the acceptance of new proposals, for a period of ninety days, or until November 26, 1983. TRPA Resolution 83-21 (Defs.' Ex. 275). Since a permit was required for almost any use of Class 1-3 or SEZ lands at all, this moratorium essentially prohibited the commencement of any new use of such land. At the end of ninety days, the ban was extended – although not by any affirmative action by TRPA, and not, contrary to what the defendants have implied, for any set period of time. The Minutes of the TRPA Governing Board regular meeting held November 17, 1983, indicate that TRPA staff members advised the Board that the end of the ninety day period was approaching, and that, absent an order by the Board to the contrary, the staff would continue to observe the moratorium, since the conditions that had led to its imposition in the first place still existed. Defs.' Ex. 286. That is, there was still no regional plan. Since the Board never took any action in response to this "advice," the moratorium was, in fact, continued in effect by the staff.

Finally, however, on April 26, 1984, a new regional plan was adopted. TRPA Ordinance 84-1 (Defs.' Ex. 299). The temporary moratorium initiated by Resolution 83-21 thus ended up lasting approximately eight months. With respect to Class 1-3 and SEZ properties, however, not

much changed. The 1984 Plan provided, at least temporarily, that no projects proposing *any* land coverage at all in Class 1-3 and SEZ lands would be considered, with limited exceptions for "regional public facilities, public outdoor recreation facilities and public works projects." TRPA Ordinance 84-1, § 4.30(2) (Defs.' Ex. 299) (incorporating by reference the document entitled "Project Review Under Adopting Ordinance," dated March 28, 1984). This prohibition may or may not have been intended to become permanent, but the provisions relating to high hazard lands, as well as numerous other provisions, apparently still had not quite been agreed upon at the time Ordinance 84-1 was adopted, and temporary measures were enacted in the interim. *See, e.g.*, TRPA Ordinance 84-1, § 2.12 (the plan area statements were "adopted as an interim policy guideline, effective until September 1, 1984, unless otherwise provided . . . "). As part of these temporary measures, the provisions of Ordinance 81-5 for approving projects were continued in force.

But no further refinements to the 1984 Plan were ever made. The very day that the new regional plan was adopted, the State of California filed suit against TRPA to block the plan's implementation. The next day, April 27, an environmental group known as the League to Save Lake Tahoe also filed suit. Both actions were filed in the Eastern District of California, and were assigned to Judge Edward J. Garcia. On May 1, 1984, Judge Garcia issued an Order to Show Cause and Temporary Restraining Order, which prohibited TRPA from issuing any permits in the Tahoe Basin, or even accepting any new applications for

permits. Order to Show Cause and Temporary Restraining Order at 3, No. Civ. S-84-0561 EJG (E.D.Cal. May 1, 1984) (Defs.' Ex. 300). The Order set a hearing date of May 31, 1984, for arguments regarding the issuance of a Preliminary Injunction. The hearing was eventually pushed back to June 11, but the Preliminary Injunction was granted – on June 15, 1984. *People of State of Cal. ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency*, No. Civ. S-84-0561 EJG, 1984 WL 6591 (E.D.Cal. June 15, 1984) (Defs.' Ex. 303). The court then issued its Order Granting Preliminary Injunction on August 9, 1984. Order Granting Prelim. Inj., No. Civ. S-84-0565 EJG (E.D.Cal. Aug.9, 1984) (Defs.' Ex. 314). The August 9 Order essentially adopted the terms of the T.R.O., except for the fact that a long list of specific exceptions (mostly for various government entities) was included. Eventually, the Preliminary Injunction was upheld by the Ninth Circuit. *People of State of Cal. ex rel. Van de Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1308 (9th Cir.1985). The injunction thus remained in force until a completely revised regional plan (the "1987 Plan") was adopted in 1987.

Also shortly after the 1984 Plan was adopted, on June 25, 1984, TRPA faced another legal challenge to the 1984 Plan – that is, the instant case. Or rather, cases. Originally, those plaintiffs owning property on the Nevada side of the Tahoe Basin filed suit in this Court, No. CV-N-84-257-ECR, and those plaintiffs owning property on the California side of the Basin filed an action in the Eastern District of California, which again was assigned to Judge Garcia, No. Civ. S-84-816 EJG. After proceeding separately for years, the California case was transferred to this Court, and the two actions were consolidated here. Order, No.

CV-N-84-257-ECR (Feb. 21, 1992) (Doc. # 132). Initially, the complaints asserted claims against TRPA, the states of Nevada and California, and the individual members of TRPA's Governing Board, for declaratory and injunctive relief for due process and equal protection violations, and damages for violations of the takings clause. In addition, the complaint stated a claim for violations of the Civil Rights Act, 42 U.S.C. §§ 1983 and 1985, as well as what is commonly known as a "Furey" claim – that is, a claim that the plaintiffs had been forced to pay certain assessments on their land, but had not been able to enjoy the benefits of the public improvements those assessments funded (such as sewer service, etc.), since they were unable to build on their land. *Furey v. City of Sacramento*, 592 F.Supp. 463 (E.D.Cal.1984), *aff'd*, 780 F.2d 1448 (9th Cir.1986).

Both in the complaints and throughout this litigation, the plaintiffs have been grouped by "class," according to the land capability district of each plaintiff's land. "Class 1-3" plaintiffs and "SEZ" plaintiffs are grouped separately. Once the cases were consolidated, the plaintiffs were further grouped by state. Thus there are four groups of plaintiffs now before the Court: Nevada-side Class 1-3 plaintiffs; Nevada-side SEZ plaintiffs; California-side Class 1-3 plaintiffs; and California-side SEZ plaintiffs. The claims of these plaintiffs have also been divided – by time period, according to the effective dates of the various ordinances and other actions challenged herein: "Period I" covers August 24, 1981, to August 26, 1983; "Period II" covers August 27, 1983, to April 25, 1984; and "Period III" covers April 26, 1984, to July 1, 1987.

In the first round of district court decisions in the mid-1980s, both this Court and the Eastern District of California dismissed all of the plaintiffs' claims. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 611 F.Supp. 110 (D.Nev.1985); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 638 F.Supp. 126 (D.Nev.1986); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, Memorandum and Order, No. Civ. S-84-816 EJG (E.D.Cal. Jan. 22, 1985); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, Memorandum of Decision and Order Granting Summ. J., No. Civ. S-84-816 EJG (E.D.Cal. Mar. 27, 1987). Both district courts were then reversed in part and affirmed in part by the Ninth Circuit. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 911 F.2d 1331 (9th Cir.1990) (*"TSPC I"*) (reviewing the District of Nevada case); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 938 F.2d 153 (9th Cir.1991) (*"TSPC II"*) (reviewing the Eastern District of California case).

In *TSPC I*, the Ninth Circuit held that all claims for declaratory and injunctive relief were moot, as the 1984 Plan had been replaced in the interim by the 1987 Plan. Further, all claims for money damages against Nevada and California were dismissed on immunity grounds. The court followed these holdings in *TSPC II*. In the Nevada case, the Ninth Circuit held that all of the plaintiffs' Period III takings and § 1983 claims against TRPA were unripe, and that the Period I takings and § 1983 claims of the Class 1-3 plaintiffs against TRPA were also unripe. In the California case, however, the Ninth Circuit held that

all of the plaintiffs' takings and § 1983 claims against TRPA were ripe.

On remand, the cases were consolidated in this Court. We allowed the plaintiffs to amend their complaints, and in doing so, the plaintiffs added claims against the 1987 Regional Plan. We again dismissed all of the plaintiffs' claims: the Period I and Period II claims on statute of limitations grounds; the Period III claims for lack of causation; and the new claims against the 1987 Plan because they had not been properly joined, were unripe, and were time-barred. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 808 F.Supp. 1474 (D.Nev.1992) (Nevada case); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 808 F.Supp. 1484 (D.Nev.1992) (California case). In addition, we dismissed the *Furey* claims, which had been remanded to us for a determination of whether any assessments had been paid to TRPA (as opposed to other local agencies), because we found that no such payments had in fact been made to TRPA.

Again, the Ninth Circuit reversed in part. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 34 F.3d 753 (9th Cir.1994) (*"TSPC III"*), *amended by* 42 F.3d 1306 (9th Cir.1994). The court held that the plaintiffs' takings claims as to Periods I and II were barred by the statute of limitations, but that their § 1983 claims as to the same periods were not time-barred. Further, the court held that the plaintiffs' § 1983 claims as to the 1987 Plan were not barred by the 60-day statute of limitations contained in the Compact. Finally, the court remanded the

plaintiffs' Period III claims for the trier of fact to determine whether or not those claims were caused by the actions of TRPA.

Subsequent to the most recent remand, we held that the plaintiffs' § 1983 claims as to the 1987 Plan, while not barred by the 60-day Compact statute of limitations, were nonetheless barred by the appropriate § 1983 statutes of limitations in both Nevada and California. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 992 F.Supp. 1218 (D.Nev.1998). Thus the recent trial, held December 1-16, 1998, only addressed the following claims: the Period I § 1983 claims of all the California plaintiffs, as well as of the Nevada SEZ plaintiffs; the Period II § 1983 claims of all the plaintiffs; and the Period III claims of the California plaintiffs. (Although by now it is clear that the plaintiffs could not bring separate "takings" claims apart from their § 1983 claims, as to the 1984 Plan both sets of claims are technically still in the case. Nonetheless, separate relief for the two sets of claims is not available.)

Further, it should be noted that we had previously ordered the trial to be bifurcated into two phases: the first phase was to establish whether the plaintiffs were entitled to compensation for any of their claims; the second (to take place only if TRPA were found liable on any claims) was to determine how much compensation the plaintiffs were owed. The recent trial encompassed only the first phase.

At trial, several witnesses testified as to the scientific basis for the findings, discussed above, that the increase in impervious land coverage in the Basin, especially in

high hazard lands, causes a corresponding increase in sediment runoff into the lake, and the subsequent eutrophication thereof. The testimony of Dr. Goldman was especially persuasive. Dr. Goldman, one of the country's leading limnologists, has been studying Lake Tahoe for almost forty years, and has personally recorded data regarding its loss of clarity. In general, we find the scientific evidence presented by the defendants to be credible.

One area that was heavily contested at trial, however, involved the testimony of two expert witnesses, one called by each side, on the subject of appraising the value of high hazard lands during the period at issue, and whether a "competitive market" for such land existed between 1981-1987 or any portion thereof. Since the resolution of this question resolves one of the major issues in the case, we will discuss it in more detail together with our discussion of the legal questions involved, infra.

CONCLUSIONS OF LAW

I. REGULATORY TAKINGS

All of the remaining claims in this case were brought under 42 U.S.C. § 1983, alleging violations of the Takings Clause of the Fifth Amendment to the United States Constitution.[2] The Takings Clause provides as follows: "nor

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[2] Actually, the plaintiffs' "pure" takings claims against TRPA as to the 1984 Plan have not technically been dismissed from the case, but it is clear by now that all claims against government actors for constitutional violations must be brought under 42 U.S.C. § 1983. *Azul-Pacifico, Inc. v. Los Angeles*, 973 F.2d 704, 705 (9th Cir.1992). There is no separate relief available for a "pure" takings claim.

shall private property be taken for public use, without just compensation." U.S. Const. amend. V. Of course, the Takings Clause is applicable to the States through the Fourteenth Amendment. *Dolan v. City of Tigard*, 512 U.S. 374, 383, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994). Technically speaking, TRPA is not a state or even a subdivision of a state – it is a separate legal entity, created by the Compact. Compact, Article III(a). Nonetheless, TRPA is clearly liable for damages for such violations. *TSPC I*, 911 F.2d 1331, 1341 (9th Cir.1990).

The Takings Clause can be violated either by direct government appropriation of property without just compensation, or by government regulation that interferes with a property owner's use of her property to the extent that it accomplishes nearly the same result as a direct appropriation. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 67 L.Ed. 322 (1922).

A. Do TRPA's Actions "Substantially Advance a Legitimate State Interest"?

The instant case does not involve any allegations of direct appropriations of land by TRPA. All of the claims are of the "regulatory takings" variety. Government regulation will constitute a taking when either: (1) it does not substantially advance a legitimate state interest; or (2) it denies the owner economically viable use of her land.

Agins v. City of Tiburon, 447 U.S. 255, 260, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980).

As to the first of these possibilities, there is as yet no clear test for determining whether a regulation substantially advances a legitimate state interest – at least in the type of situation involved here. First, though, it is clear that the "interest" being advanced must be "legitimate." We suppose an argument could conceivably be made that preventing the eutrophication of Lake Tahoe is not a legitimate interest for the government to pursue at all, but no one in this case has made that argument. Nor do we think that such an argument would ever be successful. Besides the intrinsic value of preserving the environment from degradation and destruction, the beauty of Lake Tahoe is largely responsible for driving the economy of the region, which is based almost entirely on tourism. Thus the main question to be resolved here is not whether the state interest is "legitimate," but whether TRPA's actions "substantially advanced" that interest.

The Supreme Court has developed a test to make this determination in its "unconstitutional exactions" cases, *Dolan v. City of Tigard* and *Nollan v. California Coastal Comm'n* – the "essential nexus"/"rough proportionality" test. That is, first it must be determined "whether the 'essential nexus' exists between the 'legitimate state interest' and the permit condition exacted by the city," *Dolan*, 512 U.S. at 386, 114 S.Ct. 2309 (citing *Nollan*, 483 U.S. 825, 837, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987)), and then whether some "rough proportionality" exists between the condition exacted and the "impact of the proposed development." *Id.* at 390-91, 114 S.Ct. 2309. Aside from one footnote in *Dolan*, these cases do not really indicate

whether this test should also be applied to situations in which no concession is being sought by the government in return for the grant of a permit to a specific individual. The relevant footnote states only the following: while in regard to individualized, adjudicative, permit conditions the burden of proof is on the government, "in evaluating most generally applicable zoning regulations, the burden is on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights." *Id.* at 391 n. 8, 114 S.Ct. 2309.

However, the Ninth Circuit has indicated that this test may not be limited to cases involving exactions. In *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (1996) ("*Del Monte Dunes*"), *reh'g granted*, 118 F.3d 660, *reh'g en banc denied*, 127 F.3d 1149 (9th Cir.1997), *cert. granted*, ___ U.S. ___, 118 S.Ct. 1359, 140 L.Ed.2d 509 (1998), the court applied the "rough proportionality" test to a case in which nothing was exacted – the permit was simply denied. *Id.* at 1430 (holding that "[s]ignificant evidence supports Del Monte's claim that the City's actions were disproportional to both the nature and extent of the impact of the proposed development"). More recently, though, the court held that the *Dolan/Nollan* analytical framework does not apply at all to *facial* challenges such as this one. *Garneau v. City of Seattle*, 147 F.3d 802, 811 (9th Cir.1998). Unfortunately, however, there is no majority opinion in *Garneau*, so the case is of limited precedential value. If *Garneau* is correct, then the "rough proportionality" test would not apply here – but there is no indication of what other test should then be applied instead.

Given that any other possible test would most likely be less stringent than the rough proportionality test (such as, perhaps, the *Dolan* footnote's statement that the regulation must not be "arbitrary"), it seems clear that TRPA's actions do "substantially advance a legitimate state interest." For the actions in question satisfy even the rough proportionality test. The evidence is quite convincing that further development on high hazard lands such as the plaintiffs' would lead to significant additional damage to the lake. Thus, limiting such development unquestionably satisfies the "essential nexus" part of the test. There is a direct connection between the potential development of plaintiffs' lands and the harm the lake would suffer as a result thereof. Further, there has been no suggestion by the plaintiffs that any less severe response would have adequately addressed the problems the lake was facing. Thus it is difficult to see how a more proportional response could have been adopted. Given that TRPA's actions had wide-spread application, and were not aimed at an individual landowner, the plaintiffs would appear to bear the burden of proof on this point. *Dolan*, 512 U.S. at 391 n. 8, 114 S.Ct. 2309. They have not met this burden – nor have they really attempted to do so. Although unwilling to *stipulate* to the fact that TRPA's actions substantially advanced a legitimate state interest, the plaintiffs did not seriously contest the matter at trial.

B. Do TRPA's Actions Deny the Plaintiffs "Economically Viable Use" of Their Property?

As the challenged actions of TRPA therefore clearly do "substantially advance legitimate state interests," the question to be answered next is whether those actions

deprived the plaintiffs of "economically viable use" of their property. If TRPA's actions deprived the plaintiffs of *all* economically viable use of their land, as opposed to just *some* such use, then those actions would constitute what have been referred to as "categorical" takings, with no further inquiry necessary.[3] *Lucas*, 505 U.S. at 1015, 112 S.Ct. 2886. On the other hand, if TRPA's actions deprived the plaintiffs of *some*, but not *all*, economically viable use of their land, then TRPA's actions must be analyzed under the "essentially ad hoc, factual inquir[y]" of *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978) ("*Penn Central*"). Under the *Penn Central* test, a regulation may or may not effect a taking, depending on: (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct, investment-backed expectations"; and (3) "the character of the governmental action." *Id.*

At least one of these "tests" will apply, however – that is, either the *Lucas* "categorical takings" rule, or the *Penn Central* ad hoc balancing test. In other words, it is clear that TRPA's actions did deny the plaintiffs at least some economically viable uses of their land. The question which remains to be answered – and which was hotly

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[3] Of course, this sort of categorical treatment is also accorded to regulations which require a property owner to suffer actual physical invasion of her land. *Lucas*, 505 U.S. at 1015, 112 S.Ct. 2886. This is true no matter how minute that invasion may be. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). However, no such physical invasion is alleged to have occurred here.

debated at trial – is whether the denial was total, or only partial. This question is important because the answer effectively decides the outcome of the case.

1. Did TRPA's Actions Effect a "Partial Taking" of the Plaintiffs' Property?

If we were to hold that TRPA's actions effected only a partial denial of economically viable use, then consideration of the *Penn Central* factors clearly leads to the conclusion that there was no taking. Given the temporary nature of the regulations at issue here, we cannot say that the plaintiffs' reasonable, investment-backed expectations were unduly interfered with. *Dodd v. Hood River County*, 136 F.3d 1219, 1230 (9th Cir.), *cert. denied*, ___ U.S. ___, 119 S.Ct. 278, 142 L.Ed.2d 229 (1998). Mr. Johnson, the defendants' appraiser, testified that the average holding time of a lot in the Tahoe area between lot purchase and home construction is twenty-five years. If the average purchaser expects to hold a lot for twenty-five years before building on it, then a delay of six years in being able to build would not be an interference with that purchaser's expectations at all. We recognize, of course, that some of the individual plaintiffs herein may conceivably have held their properties for almost twenty-five years by the time the restrictions on construction at issue were imposed, or may have intended to build immediately. We have no way of knowing this, since no information regarding any of the individual plaintiffs was presented at trial. Thus we must rely on testimony as to the "average" purchaser's intent. Besides, the fact that some plaintiffs may have already held their property for a long period of time would not exactly weigh in their favor. It

would certainly show that they did not intend to build immediately upon purchase. Further, they would have had plenty of time to build before the restrictions went into effect – and almost everyone in the Tahoe Basin knew in the late 1970s that a crackdown on development was in the works. The Tahoe area experienced a glut of construction in the years just before the Compact was amended in 1980, as worried property owners attempted to build while they still could. On the other hand, if some individual plaintiffs in this action acquired their property more recently than twenty-five years before the restrictions were imposed, then their expected holding time may not have been affected at all.

The facts were somewhat similar in *Dodd*, in which the Ninth Circuit found that the plaintiffs' reasonable, investment-backed expectations had not been interfered with. In *Dodd*, the plaintiffs had purchased land in 1984, but waited until 1990 to file for the necessary permit to build. For six more years, it appeared that no such permit would be granted, but in 1996 it was. However, the plaintiffs had still not commenced building by 1998, when the Ninth Circuit heard their case. The court found that the self-imposed delay in building their retirement home weighed heavily against the idea that their reasonable, investment-backed expectations had been foiled by the six-year delay they suffered as a result of the permit process. *Dodd*, 136 F.3d at 1230. Thus, we hold that, like the plaintiffs in *Dodd*, the plaintiffs in our case did not have reasonable, investment-backed expectations that they would be able to build single-family homes on their land within the six-year period involved in this lawsuit.

This factor therefore weighs against a finding that TRPA's action effected a partial taking of the plaintiffs' property.

The fact that no information on individual plaintiffs was introduced at trial also affects our ability to analyze the first of the *Penn Central* factors – that is, the economic impact of TRPA's actions on the plaintiffs. Since the burden is on the plaintiffs to show that a taking occurred (and since that burden is especially heavy in a facial challenge such as this), the fact that they agreed not to introduce this type of evidence works against them. The fact that it is a facial challenge does not mean that all evidence relating to individual plaintiffs is irrelevant at this stage. *See Garneau*, 147 F.3d at 807-08 (engaging in "ad hoc, factual inquiry appropriate in non-categorical regulatory takings cases" in acknowledged "facial" case). It may be that the instant plaintiffs could have produced evidence of this type, but they clearly chose not to do so. We assume that this was a result of a calculated choice by plaintiffs' counsel to concentrate on the plaintiffs' main contention, that TRPA's actions resulted in a categorical taking, and not a partial taking. Regardless, the fact that no evidence was introduced regarding the specific diminution in value of any of the plaintiffs' individual properties clearly weighs against a finding that there was a partial taking of the plaintiffs' property.

The third of the *Penn Central* factors, that of "the character of the governmental action," also weighs against a finding that there was a partial taking of the plaintiffs' property. As discussed above, the scientific evidence convincingly shows that Lake Tahoe was losing its clarity due to increased development in the Basin,

especially in high hazard lands. Thus limiting development on high hazard lands is a direct and reasonable way to combat the problem. Faced with the responsibility for solving a serious problem, TRPA took the necessary steps to do so. While those steps may have had a more substantial impact on the plaintiffs than on others in the Basin, the plaintiffs were not completely deprived of their land, and they retained many important rights of property ownership, such as the right to exclude others from their own land. *See Penn Central,* 438 U.S. at 124, 98 S.Ct. 2646 ("A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government [citation omitted], than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.").

Thus with all three of the *Penn Central* factors, at least to some extent, weighing against a finding that TRPA's actions constituted a partial taking, we clearly must hold that anything less than a total denial of all economically viable use of the plaintiffs' property would not constitute a taking. Since the *Penn Central* test is essentially a balancing test – "a weighing of private and public interests," *Dodd,* 136 F.3d at 1229 (citing *Agins,* 447 U.S. at 261, 100 S.Ct. 2138) – and since the interest in protecting Lake Tahoe is so strong, any test that takes that interest into account would result in victory for the defendants. However, if the plaintiffs were deprived of all economically viable use of their property, then the interest in protecting Lake Tahoe is not taken into account. No matter how noble the goal of protecting the lake, and no matter how necessary the steps taken were to achieving that goal, the

plaintiffs would be entitled to just compensation from TRPA. "It is axiomatic that the Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *First English Evangelical Lutheran Church of Glendale v. Los Angeles County,* 482 U.S. 304, 318-319, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987) (*"First English"*) (quoting *Armstrong v. United States,* 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960)).

2. Did TRPA's Actions Effect a "Total Taking" of the Plaintiffs' Property?

The most important question we must decide, then, is whether the plaintiffs have indeed been deprived of all economically viable use of their land. Thus, we must first decide *how* to answer that question. At trial, the defendants argued, essentially, that property that has been deprived of all economically viable use will be rendered completely "valueless," so that property with any remaining value, by definition, must have some remaining economically viable use. The plaintiffs, on the other hand, argued that the "value" of property is utterly irrelevant to the determination of whether any viable uses of that property remain, and even moved to exclude all evidence of value at trial. Pls.' Mot. in Limine (Oct. 30, 1998) (Doc. # 289). Both of these contentions are meritless. "Value" is unquestionably relevant to the issue of whether there has been a taking. The Ninth Circuit explicitly recognized this in *Del Monte Dunes,* 95 F.3d at 1433. The only case to which the plaintiffs point for support of their argument that "value" is irrelevant is

Lucas, which certainly does contain language stressing the importance of "use." But *Lucas* clearly relied on the lower court's finding that the regulations at issue had in fact rendered the plaintiff's property "valueless." *Lucas*, 505 U.S. at 1020 n. 9, 112 S.Ct. 2886. Thus *Lucas* could just as easily be read to support the defendants' contention that value is "everything" as the plaintiffs' contention that value is "nothing." In truth, however, *Lucas* supports neither of these extremes. It was clearly important to the Court that the property had been rendered "valueless"; likewise, however, it was also important that *Lucas* could not "use" his property in any "economically beneficial or productive" fashion. *Lucas*, 505 U.S. at 1015, 112 S.Ct. 2886. In any event, regardless of how *Lucas* could be read, the Ninth Circuit has essentially resolved the issue for us. In *Del Monte Dunes*, the court explicitly held that value, while clearly relevant, was not the main focus of the economically viable use inquiry. *Del Monte Dunes*, 95 F.3d at 1433. The court further held that proof that a property retains some value is not sufficient to prove that the property retains some economically viable use. *Id.* at 1432-33.

This holding is key to our case, because it is clear that the plaintiffs' properties – no matter how restricted their use-did retain some value during the period at issue. The defendants' appraiser, Mr. Johnson, testified to the fact that during the period at issue, some sales of Class 1-3 and SEZ properties did take place. Further, his testimony supports the proposition that all land in the Tahoe Basin has, and has always had, *some* value, no matter how limited its uses. In some instances that value may be

minimal, but none of the land is completely "valueless," as was the case in *Lucas*.

As we have seen, however, the fact that the land had some value is not sufficient. The land must retain some "economically beneficial or productive use." Of course, there is some connection between the two concepts. To a large extent, land will only have significant value if there is some use to which it can be put – for as the Supreme Court has recognized, "[w]hat is the land but the profits thereof?" *Lucas*, 505 U.S. at 1017, 112 S.Ct. 2886 (citations omitted). As for what constitutes an economically "viable," "beneficial," or "productive" use, the Ninth Circuit has held that a "use" of property is economically viable when a competitive market exists for the property as subject to the use restrictions imposed by the regulations at issue. *Del Monte Dunes*, 95 F.3d at 1433. That is, a permitted use is economically viable when a sufficient number of people would be willing to buy the property for that use, whatever it might be, to make the property "commercially marketable." *Id.* at 1434. The fact that the permitted use might not be the one to which the current owner wanted to put the property does not matter. *See Dodd*, 136 F.3d at 1228-30 (fact that property could be used for "timber production" was considered economically viable use, even though the plaintiffs wanted to build a retirement home). As long as there is some type of competitive market for the land for its permitted use, than the use would appear to be an "economically viable" one.

However, if there is only one willing buyer, there would not, by definition, appear to be a "competitive" market. *See Del Monte Dunes*, 95 F.3d at 1432-33. Thus the

fact that someone, such as the government or an environmental group, may be willing to pay for land that can only be "used" in its natural state does not necessarily mean that the "use" of leaving the property in its natural state is an "economically viable" one.

It is important, therefore, to determine just what "uses," if any, the plaintiffs could make of their property, as well as whether any of those uses were economically viable – i.e., whether a competitive market existed for the land if put to that use. At trial, therefore, a substantial amount of time was spent examining the potential uses to which the plaintiffs' land could or could not have been put under the regulatory system in place in the Basin during the time periods at issue. To this end, the parties discussed houses, toolsheds, vegetable gardens, dog runs, kennels, corrals, barns, hiking trails, parking lots, greenhouses, driveways, treehouses, gazebos, tennis courts, swimming pools, golf courses, picnic facilities, camp grounds, farms, pumpkin patches, berry fields, other small agricultural endeavors, boat repair and storage facilities, jungle gyms, soccer fields, baseball diamonds, timber production, and a variety of other "uses" to which land in general, and the plaintiffs' land in particular, could conceivably be put. Whether any of these uses were permissible at all depends largely on the wording of TRPA's ordinances.

a. Did Ordinance 81-5 Deprive the Plaintiffs of All Economically Viable Uses of Their Property?

First, under 81-5, no use or activity could be conducted on SEZ lands without a permit, and no permit would be granted if the proposed activity involved grading, clearing, removal of vegetation, filling or creation of land coverage. Of the uses listed above, very few would appear to be possible without involving some clearing, grading, removal of vegetation, etc. Unlike Class 1-3 property owners, SEZ owners could not avail themselves even of the exemption for "minor grading" provided in Ordinance 81-1. TRPA Ordinance 81-1, §§ 2.00, 3.8(1). It does appear that a few "uses" may have been available to SEZ owners, but it is highly doubtful that any of these uses could ever be considered economically viable.

Nonetheless, we have considered the evidenced [sic] offered by the defendants to prove that such uses were in fact economically viable – that is, the testimony of Mr. Johnson. Mr. Johnson, a respected appraiser with a practice based in the Tahoe Basin, testified that sales of SEZ property did take place during the period at issue. Specifically, he referred to six sales and one offer in a period stretching from June 11, 1981, to January 5, 1990. One of these took place shortly before Ordinance 81-5 was enacted; another sale, as well as the offer, took place within the period of time 81-5 was effective. *See* Defs.' Ex. 32. He further testified that this sampling of sales was only "representative," and that in his opinion other sales of SEZ lands probably occurred in that time frame. Unfortunately, we cannot conclude that one actual sale, even if

considered "representative," demonstrates that a "competitive market" for such land existed, as the Ninth Circuit requires – especially given that somewhere in the neighborhood of 8000 to 9000 undeveloped lots existed in the Basin at the time. Mr. Johnson's testimony also supports the idea that, if there were sales, almost all of them were probably to a neighbor looking to protect a view, or enlarge his own lot, or for similar reasons. If the only potential purchaser of a given lot is a neighbor, that does not necessarily suggest a "competitive" market. A single purchaser will not usually have any "competition" for the land. Even the sales of which there is evidence seem generally to have been made for relatively low prices, which also suggests that demand for such properties was extremely low.

As for Class 1-3 properties, the analysis is similar, although only California properties are still at issue with respect to Ordinance 81-5. The claims of the Nevada-side Class 1-3 plaintiffs as to Ordinance 81-5 were dismissed by this Court as unripe in 1986, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency,* 638 F.Supp. 126, 133 (D.Nev.1986), due to the existence of the so-called "case-by-case" exception. The dismissal of these claims was upheld by the Ninth Circuit in *TSPC I,* 911 F.2d 1331, 1339 (9th Cir.1990). Mr. Johnson testified that there were sales of Class 1-3 properties in California during the relevant time period, but again could only point to a few examples. Defs.' Ex. 78a. In fact, none of the offered examples actually occurred during the period Ordinance 81-5 was in effect, although two of them took place in the months prior to its enactment. Since the Ordinance 81-5 provisions as to California land actually

went into effect on an earlier date in California, the effect is no doubt the same. Again, however, those few sales do not convince us that a competitive market for such land existed.

It is true that more "uses" were permissible for Class 1-3 properties, even in California, than for SEZ properties generally. These uses included "outdoor recreation facilities," and uses involving "minor grading" – provided no land coverage in excess of the Bailey coefficients was created. Thus while a few more uses, such as a garden, may have been permissible and even feasible, they do not appear to be any more "economically viable" than those permitted even on SEZ lands, such as hiking. While in theory some "outdoor recreation facilities" might be economically viable in certain conditions, we have assumed throughout this litigation that those conditions are not present on the plaintiffs' lands. For instance, golf courses, ski facilities, and even campgrounds may sometimes be quite profitable – but not on a lot intended for the building of a single-family home, surrounded by lots on which other single-family homes have already been built. We have been led to assume throughout this case that the plaintiffs all own single-family lots that would not be capable of supporting uses such as golf courses, ski facilities, or campgrounds (even assuming such facilities could be built without exceeding the coverage limitations). An average-size, single-family lot, at around 10,000 square feet, just is not large enough for any of these activities. We note, however, that some plaintiffs do own more than one lot. Should it prove to be true that any plaintiff owns two or more *contiguous* lots which together might be

suitable for any "economically viable" "outdoor recreation facility"-type uses, we would need to reexamine this issue with respect to those plaintiffs. The fact that a plaintiff may own two or more *non*-contiguous lots is irrelevant – each lot is considered separately. Only lots that might be combined to form one, larger lot will be subject to any possible reconsideration on this point. In addition, we note that we have also always assumed that none of the plaintiffs' land was in either "approved subdivisions" or "man-modified areas," either of which would, if true for an individual plaintiff, make that plaintiff unable to prove that Ordinance 81-5, on its face, effected a taking of her property.

Thus, we are forced to conclude that Ordinance 81-5 did in fact deny the plaintiffs all economically viable use of their land. Unless the defendants prevail on one of the two "affirmative defenses" they have advanced, which will be discussed below, it is clear that Ordinance 81-5 effected a taking of the plaintiffs' property, and that the plaintiffs are therefore entitled to compensation for the period between August 24, 1981, and August 26, 1983. That is, those plaintiffs whose Period 1 claims have not already been dismissed are entitled to compensation for this period. Those plaintiffs owning Class 1, 2, or 3 land on the Nevada side of the Tahoe Basin are not entitled to compensation for this period. All other plaintiffs – i.e., Nevada-side SEZ plaintiffs and California-side Class 1, 2, 3, and SEZ plaintiffs – are entitled to compensation – assuming, of course, that none of these plaintiffs own two or more contiguous lots capable of being combined into a useful larger lot, or lots in "man-modified areas," or "approved subdivisions." Therefore, when we reach the

damages phase of the trial, the defendants will be allowed to present evidence going to show that these assumptions are not valid with respect to any individual plaintiffs' lot.

b. Did Resolution 83-21 Deprive the Plaintiffs of *All* Economically Viable Use of Their Property?

During the second time period, under Resolution 83-21, uses were even more restricted. Resolution 83-21 suspended all permit approvals – and it appears that basically any use of either Class 1-3 or SEZ lands required a permit. Without permits, therefore, no uses were really permissible. It is possible that Class 1-3 owners might have been able to conduct some "minor grading" on their property without getting a permit, since Ordinance 81-1 had defined "minor grading" as "not a project." TRPA Ordinance 81-1, §§ 2.00, 3.80(1). However, as discussed above, there is no evidence that the ability to conduct "minor grading" would have enabled the plaintiffs to "use" their property for anything much more "economically beneficial" than if they were not allowed to conduct minor grading. The evidence does not support a finding that there was a competitive market for high hazard land while 83-21 was in force. Again, therefore, we are forced to conclude that Resolution 83-21 denied the plaintiffs all economically viable use of their land. Barring success by the defendants in either their "nuisance" or "temporary takings" arguments, Resolution 83-21 is a taking, and the plaintiffs are entitled to compensation for the period from August 27, 1983, to April 25, 1984. For this period, all

plaintiffs, on both sides of the Basin, are entitled to compensation.

c. Did the 1984 Plan Deprive the Plaintiffs of All Economically Viable Use of Their Property?

The foregoing analysis assumes, of course, that TRPA's actions actually caused the plaintiffs' injuries. With respect to Ordinances 81-5 and Resolution 83-21, no one ever challenged that this was indeed the case. Nor could they – it is clear that TRPA's actions were the cause of the plaintiffs' damages. In fact, in most regulatory takings cases, there is never any doubt about whether the government's actions caused the plaintiff's injuries. With respect to the third and final of TRPA's actions challenged here, however, the issue of causation has been hotly debated. The defendants claim that, with respect to the 1984 Plan, the plaintiffs' injuries were actually caused by the injunction issued by Judge Garcia in the litigation brought by the state of California and the League to Save Lake Tahoe.

There is very little discussion of the "causation" issue in any of the case law involving regulatory takings. However, it is clear that the cases implicitly assume that the challenged government action must be both the cause in fact and the proximate cause of the plaintiff's injuries. In addition to the few regulatory takings cases that do explicitly reflect this view, this is also supported by other (i.e., non-regulatory) takings cases, and by other types of § 1983 cases.

First, in *Penn Central*, the Supreme Court mentioned almost in passing that "whether a particular restriction will be rendered invalid by the government's failure to pay for any losses *proximately caused* by it depends largely 'upon the particular circumstances [in that] case.' " 438 U.S. at 124, 98 S.Ct. 2646 (quoting *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168, 78 S.Ct. 1097, 2 L.Ed.2d 1228 (1958)) (emphasis added) (alteration in original). The Court of Federal Claims has held that the "burden of plaintiff is to show that 'but for' the federal government's action they would have been able to realize their plans for the property allegedly taken." *Bowles v. United States*, 31 Fed. Cl. 37, 49 (1994). Earlier, the Claims Court had held that "[b]efore a court will find a compensable taking, it must be additionally satisfied that 1) plaintiff's loss was directly and proximately caused by governmental action." *Johns-Manville Corp. v. United States*, 12 Cl.Ct. 1, 34 (1987). *Cf. Wheeler v. City of Pleasant Grove*, 833 F.2d 267, 269 (11th Cir.1987) (reversing district court's decision that "the implementation of Ordinance No. 216 had not proximately caused any compensable injury to the plaintiffs").

Further, in one specific line of non-regulatory takings cases, involving flooding caused by federal government action in making improvements to navigable waters, several courts have explicitly held that the government action must be the "direct and proximate cause" of the property owner's damages in order to constitute a taking. *E.g., Loesch v. United States*, 227 Ct.Cl. 34, 645 F.2d 905, 913 (1981) (holding that "if there is no proper showing that governmental action was the proximate and direct cause of the erosion damage, there can be no liability for a fifth

amendment taking"); *Rhoads v. United States*, 6 Cl.Ct. 278, 279-80 (1984), *aff'd mem*, 770 F.2d 182 (Fed.Cir.1985) (holding that "[p]laintiffs must prove by a preponderance of the evidence that the construction and operation of the navigation dam in issue were the direct and proximate cause of the erosion damages suffered by them on their riparian banks").

Finally, other § 1983 cases unquestionably hold that causation is an element of the claim. *Arnold v. IBM Corp.*, 637 F.2d 1350, 1355 (9th Cir.1981):

> Causation is a concept that is not often discussed or explicitly stated in civil rights cases . . . . Although causation is not stated explicitly in these formulations, it is an implicit requirement. . . .
>
> The causation requirement of sections 1983 and 1985 is not satisfied by a showing of mere causation in fact. . . . Rather, the plaintiff must establish proximate or legal causation. . . .
>
> . . . The standard for causation . . . is more than that of causation in fact. [It] closely resembles the standard "foreseeability" formulation of proximate cause. . . .

Id. See also, Coral Constr. Co. v. King County, 941 F.2d 910, 926 (9th Cir.1991) (holding that "like section 1983, section 1981 is by nature a tort remedy. . . . Accordingly, it follows that causation is also an element of a section 1981 cause of action."); *Wright v. City of Reno*, 533 F.Supp. 58, 64 (D.Nev.1981) (stating that the "causation requirement, of both §§ 1983 and 1985, is not satisfied by a showing of mere causation in fact; rather, the plaintiff must establish proximate or legal causation"). Only one case seems to

have addressed the issue in the context of a takings claim brought as a § 1983 claim: "To establish a takings claim under 42 U.S.C. § 1983, [the plaintiff] must show (1) a property interest; (2) that has been taken under the color of state law; (3) without just compensation. [citation omitted]. In addition, in order for liability to attach to a municipality, such as the County, a plaintiff must show that it was an official policy or custom or practice that *proximately caused* the constitutional violation." *HBP Assocs. v. Marsh*, 893 F.Supp. 271, 277 (S.D.N.Y.1995) (emphasis added).

However, while it is clear that TRPA's actions must have been the "proximate cause" of the plaintiffs' damages in order for liability to attach, it is not clear just what constitutes "proximate cause." Tort claims are generally governed by state law, not federal, but that cannot be true here, since we are actually faced with a question of federal constitutional law. There is no real federal law of torts, and even if there were, it would not necessarily apply. The issue here is not really analogous to a negligence claim at all. First, both TRPA and Judge Garcia acted intentionally, not negligently – but obviously neither acted maliciously or with criminal intent, so common-law intentional torts are not strictly analogous either. One common test is the "but for" test, which the Court of Federal Claims seems to have adopted in the takings area. *Bowles*, 31 Fed. Cl. at 49. If we adopt the Court of Federal Claims' formulation – that is, that the plaintiffs must prove that "but for" TRPA's action they would have been able to develop their property – then TRPA clearly did not cause the plaintiffs' injuries, at least with regard to any harm they may have suffered after

May 1, 1984. The 1984 Plan, as enacted, was not strict enough for California, the League to Save Lake Tahoe, Judge Garcia, or the Ninth Circuit. Clearly, had TRPA enacted a less stringent plan – i.e., one that allowed the plaintiffs to build on their Class 1-3 and SEZ properties – the injunction would still have issued barring TRPA from granting any permits or even accepting any applications.

It has often been stated in regulatory takings cases involving temporary takings that the government retains a choice once a regulation has been proven to effect a taking – either to retain the regulation in force and pay just compensation for the total value of the property, or to repeal the regulation and only face damages for the temporary period in which the regulation was enforced. The Supreme Court has been careful not to allow property owners to be able to "force" the government to exercise its power of eminent domain. *First English*, 482 U.S. at 317, 107 S.Ct. 2378 ("The Court has recognized in more than one case that the government may elect to abandon its intrusion or discontinue regulations. [citations omitted]. Similarly, a governmental body may acquiesce in a judicial declaration that one of its ordinances has effected an unconstitutional taking of property; the landowner has no right under the Just Compensation Clause to insist that a "temporary" taking be deemed a permanent taking."). In a sense, that is exactly what the injunction did in this case. Of course, the injunction ultimately proved temporary as well, but it deprived TRPA of the ability to change its mind, so to speak, in the interim, and allow the plaintiffs to begin building. In addition, there is language in Ordinance 84-1 that suggests that, at least with respect to Class 1-3 lands, the agency might eventually develop a

screening system that would allow some of those property owners to build. TRPA Ordinance 84-1, § 1.24. With the injunction in place, however, TRPA would not have been able effectively to amend the Plan to include such a screening system, and thus end its "temporary taking," at least with respect to some plaintiffs. Especially given the uphill battle that the plaintiffs face in proving a facial takings claims, *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 736 n. 10, 117 S.Ct. 1659, 137 L.Ed.2d 980 (1997), the plaintiffs have not shown that the 1984 Plan was actually the cause of the damages they may have suffered from April 26, 1984, to July 1, 1987.

Once the 1984 Plan was adopted, 81-5 and 83-21 were superseded and could cause no damages to plaintiffs. The fact the 1984 Plan may have incorporated some of the prohibitions of 81-5 and 83-21 makes no difference. The 1984 Plan was adopted as an independent, free-standing ordinance, replacing the prior ordinances and resolutions in their entirety.

The real cause of plaintiffs' harm after the T.R.O. was entered was the effect of the T.R.O. and the Preliminary Injunction, not the 1984 Plan. The 1984 Plan was for all practical purposes suspended by the T.R.O. and the Preliminary Injunction. The escape mechanisms of the 1984 Plan were nullified. No one could file an application, have an application processed, or receive a permit, notwithstanding whatever land classification was involved. Class 1, 2, 3, and SEZ classifications became irrelevant to whether a person could obtain a permit for the use of her land. The reason a permit could not be obtained was the T.R.O. and the Preliminary Injunction, not the 1984 Plan.

The 1984 Plan had no further consequences to anyone after the T.R.O. and the Preliminary Injunction were issued; these orders blocked issuance of permits for whatever reason, unless exempted specifically by them. The T.R.O. and Preliminary Injunction did not allow the 1984 Plan to go into effect, and after they were entered, the 1984 Plan could no longer inflict harm on plaintiffs because it was not the reason plaintiffs were unable to use their lands. The reason there could be no development of plaintiffs' lands was the T.R.O. and the Preliminary Injunction.

At trial, the parties focused primarily on the "foreseeability" question – that is, whether TRPA foresaw or should have foreseen that the injunction would issue. It does seem possible that TRPA may have foreseen that it would be sued. However, it does not necessarily follow that it was foreseeable that the injunction would be granted. Contrary to the plaintiffs' assertions, TRPA was reasonable and acted in good faith in attempting to comply with the Compact. There is no evidence whatsoever to support the plaintiffs' theory that TRPA secretly wanted an injunction against all construction in the Basin, and deliberately passed a deficient regional plan in order to provoke a lawsuit and, subsequently, an injunction. In addition, TRPA had been advised by its attorneys that it had legislative discretion, which would be given great deference by the courts. TRPA would therefore not necessarily have had any reason to believe that it would lose and be enjoined. TRPA clearly fought the injunction vigorously.

For the foregoing reasons, therefore, we find that none of the plaintiffs are entitled to compensation from

the defendants for the period between April 26, 1984, and July 1, 1987. For future reference, we note here that this holding really only affects the California plaintiffs – the Nevada plaintiffs' claims as to this period were dismissed long ago. *TSPC I*, 911 F.2d at 1339. We recognize that *TSPC II* did not follow the holding in *TSPC I*, since there was no majority opinion in *TSPC I* as to why the dismissal of those particular claims was being upheld – Judge Reinhardt (writing for the court in a "per curiam" opinion) felt that the 1984 Plan claims were unripe, while Judge Fletcher felt that they should be dismissed because of the causation issue. Judge Kozinski, meanwhile, dissented on this point. Nonetheless, the dismissal of these claims is the law of the case. We recognized this in our 1992 order, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 808 F.Supp. 1474, 1477-78 (D.Nev.1992), and nothing has changed since then.

II. AFFIRMATIVE DEFENSES

As mentioned above, the defendants also claim that, notwithstanding the fact that some of TRPA's actions may have resulted in the complete denial of all economically viable use of the plaintiffs' property, those actions nonetheless should not be considered takings. First, the defendants argue that, since Ordinance 81-5 and Resolution 83-21 were always intended merely as temporary measures, not permanent solutions, they are not takings. Second, the defendants argue that the harm they were trying to prevent – that is, the eutrophication of Lake Tahoe – constitutes a "nuisance" under preexisting California and Nevada law, and thus falls within the "nuisance exception" discussed in *Lucas*. The plaintiffs, naturally, take

issue with the idea that either of these arguments should be sufficient to relieve the defendants from liability, given a finding that TRPA's actions deprived the plaintiffs of all economically viable use of their property. Both of these "affirmative defenses" will be discussed in turn below.

A. Temporary Planning Moratoria

The defendants argue that both Ordinance 81-5 and 83-21 were "reasonable temporary planning moratoria," and thus not takings. The plaintiffs, understandably, point to *First English*, for the proposition that compensation is required even for "temporary" takings. Read with *Lucas*, they say, *First English* actually mandates that all temporary moratoria on development be regarded as takings.

Unfortunately – and somewhat surprisingly – the answer is not clear. The only thing that is clear is that this is an open question. As a recent Eleventh Circuit case makes clear, "whether a temporary moratorium on development necessarily effects a temporary taking" is a "significant constitutional question of first impression." *Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1073 (11th Cir.1996), *cert. denied*, ___ U.S. ___, 118 S.Ct. 441, 139 L.Ed.2d 378 (1997). The defendants have made an excellent case for the existence of this type of exception to the rule of *First English*.

Prior to *First English*, it was fairly clear that temporary, interim planning moratoria were not considered takings. Zoning boards, cities, counties, and other agencies used them all the time to "maintain the status quo pending study and governmental decision making." *Williams*

v. City of Central, 907 P.2d 701, 706 (Colo.Ct.App.1995). This makes sense, given that it is hard to enact a comprehensive zoning or land use plan overnight. People acting in anticipation of such a plan's imminent passage may cause the very harm the plan is meant to prevent.

However, it is unclear whether such moratoria remain legitimate planning tools after *First English*. *First English* held that states must compensate property owners for the period an unconstitutional ordinance is in effect, even if the ordinance is later invalidated or repealed. The ordinance at issue in *First English* was a complete moratorium on construction in a flood plain, enacted immediately after a flood had destroyed the existing buildings and improvements. The Court held, essentially, that once the government has "taken" property by a moratorium on construction, the fact that the moratorium later turns out to be only temporary does not relieve the government from its obligation to pay for the duration of the taking. *First English*, 482 U.S. at 322, 107 S.Ct. 2378.

Nonetheless, several courts since *First English* have held that interim planning moratoria do not always constitute takings. *Santa Fe Village Venture v. City of Albuquerque*, 914 F.Supp. 478, 483 (D.N.M.1995); *Williams*, 907 P.2d at 704; *Woodbury Place Partners v. City of Woodbury*, 492 N.W.2d 258, 262 (Minn.Ct.App.1992) *cert. denied*, 508 U.S. 960, 113 S.Ct. 2929, 124 L.Ed.2d 679 (1993); *First English Evangelical Lutheran Church v. County of Los Angeles*, 210 Cal.App.3d 1353, 258 Cal.Rptr. 893, 906 (1989) ("First English II") (decision of the California Court of Appeal on remand from the Supreme Court), reh'g denied and opinion modified (June 23, 1989), review denied (Aug. 25,

1989), *cert. denied*, 493 U.S. 1056, 110 S.Ct. 866, 107 L.Ed.2d 950 (1990); *Zilber v. Town of Moraga*, 692 F.Supp. 1195, 1206-07 (N.D.Cal.1988). This is not as surprising as it may sound at first blush. *First English* itself said that "[w]e limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us." *First English*, 482 U.S. at 321, 107 S.Ct. 2378. Further, there are significant differences between the moratorium at issue in *First English* and interim planning moratoria.

The primary difference between a temporary planning moratorium and the "temporary taking" of *First English* is essentially, as one court has described it, the difference between a "prospectively temporary" moratorium and a "retrospectively temporary" moratorium. *Woodbury Place Partners*, 492 N.W.2d at 262; *see also Williams*, 907 P.2d at 705; Frank Michelman, *Takings, 1987*, 88 Colum. L.Rev. 1600, 1621 (1988). In *First English*, the moratorium at issue was enacted with no termination date. In other words, it was not obviously intended to be temporary. According to its terms, it did not contain a date for its own expiration. Thus it would last until it was invalidated by a court, or repealed or amended. It only turned out to be temporary in retrospect, when it was amended to provide for the possibility of a variance or permit of some kind. An interim planning moratorium, on the other hand, is enacted with a deadline, usually for a short period of time. Thus, in a manner of speaking, the culpability of the government is less. Enacting an unconstitutional ordinance with no plans to end it is different

than simply putting a hold on development for a few months while trying to formulate a plan under which development will be possible.

Also, the ordinance at issue in *First English* was assumed by the Court to have "denied appellant all use of its property for a considerable period of years." *First English*, 482 U.S. at 322, 107 S.Ct. 2378. Most "interim" moratoria do not last for a "considerable period of years." If they do, they may well become unreasonable and become a taking at some point.

In short, *First English* holds that, once there has been a taking, compensation is required. Obviously, however, if there is no taking to begin with, then no compensation will be required. Thus some courts have held that interim planning moratoria, when reasonable in scope and duration, do not effect takings at all, temporary or otherwise. *See First English II*, 258 Cal.Rptr. at 906. The plaintiffs argue that, while this may have been a legitimate interpretation of the Supreme Court's decision in *First English* initially, it is no longer a permissible reading after *Lucas*. Since *Lucas* held that it does not really matter what the government's interest is when property has been deprived of all economically viable use, it should not matter how reasonable the delay is when all economically viable use is taken away for a short time. Some courts, however, have not found this argument persuasive. The response to this argument appears to be that, when a regulation is designed to be temporary, it will not, in fact, actually deprive property of *all* economically viable uses. When everyone expects the restrictions on use to end soon, there will likely still be a competitive market for the land. If the restrictions are permanent, on the other hand,

and no one expects them to end soon, the existence of a competitive market for the land is much less likely.

Thus at least two courts have held that temporary, interim planning moratoria should not be analyzed under the "categorical" takings rule of *Lucas*, but rather under the *Penn Central*, ad hoc, factual inquiry appropriate to *non*-categorical takings. *Williams*, 907 P.2d at 706-07; *Woodbury Place*, 492 N.W.2d at 263; *see also Santa Fe Village Venture*, 914 F.Supp. at 483 ("The moratorium in this case, however, did not amount to a compensable taking of the value of the property as a whole. The challenged moratorium was limited in duration (two and one-half years), designed to preserve the status quo, and enabled Congress to take legislative action concerning a potential National Monument. Thus, the scope and time of the moratorium were limited, not substantively unreasonable, and may be upheld as a matter of law given the record.").

Whether the Supreme Court would actually uphold this view is uncertain – but it is certainly possible, since *First English* and *Lucas* can be read to allow for such a result. However, we feel that, should the issue be presented to the Supreme Court, it would reach the opposite conclusion. The language in *First English* which seems to exempt "normal delays" in the permitting process clearly does not include interim moratoria. The examples given (building permits, changes in zoning ordinances, variances) all appear to involve delays that might occur once the process of applying for a permit has actually begun – not something that prevents the permit process from beginning at all. Further, the Court's reasoning in *First*

English would not seem to exempt "prospectively" temporary takings. The Court relied heavily on cases involving temporary appropriations of property by the United States during World War II, where compensation was clearly required. *First English*, 482 U.S. at 318, 107 S.Ct. 2378. Two of those cases, at least, involved appropriations of property that *were* prospectively temporary – the government had appropriated leasehold interests with fixed termination dates. *United States v. Petty Motor Co.*, 327 U.S. 372, 66 S.Ct. 596, 90 L.Ed. 729 (1946); *United States v. General Motors Corp.*, 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945). Since the Court relied on these cases in finding that "retrospectively" temporary regulatory takings should be compensated, it is hard to see that it would reach a different conclusion when faced with a "prospectively" temporary regulatory taking.

Finally, although we acknowledge the possibility that temporary moratoria on development may not automatically effect takings – and even the wisdom of recognizing that possibility – it does not appear that either Ordinance 81-5 or Resolution 83-21 truly fall into that category. Although 81-5 was clearly intended to be temporary, since it was adopted pending the enactment of a new regional plan, there was no fixed date for when it would terminate. One could argue that the 1980 Compact fixed the date of termination, since TRPA only had thirty months total in which to enact a regional plan – but that deadline was clearly exceeded by TRPA. With respect to Resolution 83-21, there was, of course, a built-in time limit of ninety days. But the deadline had no effect – the moratorium was continued at the end of ninety days, again until the passage of the over-due regional plan. We

do not mean to imply that TRPA was unreasonable in enacting temporary moratoria on building in high hazard lands, or that TRPA wasted time in the planning process and should have reached agreement on a regional plan sooner than it did In fact, we do not see how TRPA could have reached agreement on a regional plan any sooner. But the indefiniteness of the ordinances at issue does suggest that this is not the right case in which to hold that temporary planning moratoria do not always effect takings. Therefore, we hold that the fact that Ordinance 81-5 and Resolution 83-21 may have been intended to be temporary from the beginning does not exempt TRPA from the requirement of paying just compensation for the denial of the use of their land that the plaintiffs experienced during the time the two measures were in effect.

B. Nuisance

Finally, the defendants also argue that, notwithstanding the fact that Ordinance 81-5 and Resolution 83-21 may have denied the plaintiffs all economically viable use of their property, TRPA's actions did not effect takings. According to the defendants, the uses prohibited by the ordinances constitute "nuisances" that can be restricted without a need for just compensation.

The basis for this so-called "nuisance exception" goes back over a century, and was first articulated by the Supreme Court in the case of *Mugler v. Kansas*, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887), in which the Court upheld a prohibition against the use of a building as a brewery (due to a general prohibition against the manufacture or sale of alcoholic beverages within the state of

Kansas), even though the prohibition drastically reduced the value of the property. The most modern formulation of the exception, however, is in *Lucas*.[4]

Lucas held that, "[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Lucas*, 505 U.S. at 1027, 112 S.Ct. 2886. In other words, all land is subject to some restrictions on use. If, at the time land is purchased, certain uses are restricted or prohibited, then the purchaser of that property does not acquire the right to put the land to one of those forbidden uses. Those uses are not part of the "bundle of rights" which the purchaser receives with the land. Thus, if the purchaser does put his property to such a use, the government can come in and put a stop to it without effecting a taking – even if the forbidden use was the only economically viable use of the property. *Id.* at 1029-30, 112 S.Ct. 2886.

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[4] We recognize that since *Lucas*, debate has raged over whether the "exception" discussed therein should still be referred to as the "nuisance" exception, or as something else. The plaintiffs in this case, for instance, refuse to acknowledge the continued existence of a "nuisance" exception, repeatedly referring to the exception as either the "*Lucas*" exception, or the "so-called nuisance" exception. We find this dispute to be of no moment to the questions we must resolve here, however. For the sake of convenience, we refer to the exception as the "nuisance exception," fully aware that the exception, whatever it is called, is not the same post-*Lucas* as it was prior thereto.

The question, then, is whether a given use was part of the bundle of rights which a property owner acquired with her property. To resolve this question, the *Lucas* Court held that the relevant inquiry was whether the restrictions on use "inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id.* at 1029, 112 S.Ct. 2886.

Clearly, if a use would always have been considered a common law nuisance under state property law, then it can be prohibited without the prohibition's constituting a taking. What the *Lucas* opinion does not make completely clear, but which most courts since appear to have accepted, is that "newly legislated or decreed" restrictions on land use can also constitute "background principles" of state law for this purpose – so long as those restrictions became law *before* the property owner actually purchased the property subject to the restrictions. *City of Virginia Beach v. Bell*, 255 Va. 395, 498 S.E.2d 414, 417 (1998), *cert. denied*, ___ U.S. ___, 119 S.Ct. 73, 142 L.Ed.2d 57 (1998); *Anello v. Zoning Bd. of Appeals of the Village of Dobbs Ferry*, 89 N.Y.2d 535, 656 N.Y.S.2d 184, 678 N.E.2d 870, 871 (1997), *cert. dismissed*, ___ U.S. ___, 118 S.Ct. 2, 138 L.Ed.2d 1036 (1997); *Gazza v. New York State Dept. of Envi. Conservation*, 89 N.Y.2d 603, 657 N.Y.S.2d 555, 679 N.E.2d 1035, 1039 (1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 58, 139 L.Ed.2d 22 (1997); *Grant v. South Carolina Coastal Council*, 319 S.C. 348, 461 S.E.2d 388, 391 (1995); *Hunziker v. State*, 519 N.W.2d 367, 371 (Iowa 1994), *cert. denied*, 514 U.S. 1003, 115 S.Ct. 1313, 131 L.Ed.2d 195 (1995); *Scott v. City of Del Mar*, 58 Cal.App.4th 1296, 68 Cal.Rptr.2d 317, 322-23 (1997); *Aztec Minerals Corp. v.*

Romer, 940 P.2d 1025, 1032 (Colo.Ct.App.1996). In such a case, the prior owner of the property may have had a valid takings claim, but subsequent purchasers probably will not.

Thus in order to show that TRPA's actions did not effect a taking under the nuisance exception, the defendants must demonstrate that the uses prohibited by those ordinances could have been prohibited by either:

> 1) the common law of nuisance of either California or Nevada,[5] or
>
> 2) some affirmative state or local ordinance prohibiting such uses, which was enacted prior to the plaintiffs' acquisition of their property.

In this connection, it is important to note that this is an affirmative defense, and as such the burden is on the defendants to prove that such uses would have been enjoinable under background principles of state law. *Lucas*, 505 U.S. at 1031, 112 S.Ct. 2886 (stating that "to win its case South Carolina must do more than proffer the legislature's declaration that the uses *Lucas* desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim such as *sic utere tuo ut alienum non laedas*. . . . Instead, as it would be required to do if it sought to restrain *Lucas* in a

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[5] Obviously, those plaintiffs owning land in California would be governed by California nuisance law, and those plaintiffs owning land in Nevada would be governed by Nevada nuisance law. In theory, this could result in a situation in which something might be a "nuisance" on one side of the lake but not on the other. However, we have not found this to be the case.

common-law action for public nuisance, South Carolina must identify background principles of nuisance and property law that prohibit the uses [*Lucas*] now intends in the circumstances in which the property is presently found").

Before delving into the common law of either Nevada or California, it is also worth noting that *Lucas* itself casts doubt on the idea that "common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land; they rarely support prohibition of the 'essential use' of land." *Id.* at 1031, 112 S.Ct. 2886. Further,

> "[t]he fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition (though changed circumstances or new knowledge may make what was previously permissible no longer so[)]. . . . So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant."

Id. Thus it appears that the defendants face a rather difficult battle in attempting to show that the building of single-family homes at Lake Tahoe would have constituted a nuisance in either California or Nevada. Property owners who had constructed homes on high hazard lands prior to the time period at issue here have most definitely not been required to tear down their homes and recreate a natural environment.

In California, nuisance is defined by statute as:

> Anything which is injurious to health, . . . or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.

Cal. Civ.Code § 3479. There is an extensive body of case law in California on what constitutes a nuisance, and it does appear that pollution of water is generally treated as one, and has been treated as such for a long time. "The law is well settled that any use of a stream which materially fouls and adulterates the water, or the deposit or discharge therein of any filthy or noxious substances that so far affect the water as to impair its value for the ordinary purposes of life, or anything that renders the water less wholesome than when in its ordinary state, will constitute a nuisance, which courts of equity will enjoin, and for which a lower riparian owner, injured thereby, is entitled to redress." *Joerger v. Pacific Gas & Elec. Co.*, 207 Cal. 8, 276 P. 1017, 1025 (1929).

However, the current situation is not clearly analogous to either the code definition or the case law. All of the cases cited by the defendants require a much more significant contribution to the problem on the part of those enjoined, as well as a much more significant problem to begin with. *See, e.g., People v. Gold Run Ditch & Mining Co.*, 66 Cal. 138, 4 P. 1152, 1153-54 (1884) (upholding injunction against hydraulic mining company that had been "daily discharging into the [American] river between four and five thousand cubic yards of solid material from its said mine, to-wit, of bowlders [sic],

cobbles, gravel, and sand," which, together with similar discharges of other companies, had caused the American and Sacramento Rivers to become 6 to 12 feet shallower, making navigation much more difficult, and in some places impossible, and the likelihood of flooding much greater); *People ex rel. Ricks Water Co. v. Elk River Mill & Lumber Co.*, 107 Cal. 214, 40 P. 486, 487 (1895) (upholding injunction against maintaining cattle and hogs on banks of river, where this had resulted in, among other problems, "a pile of manure about seventy feet in length, eight feet deep, and sixteen to eighteen feet in width," and which the defendant had allowed "to lie there and rot on the bank of said stream, and the drainage therefrom flow directly into the waters of said stream, and pollutes the same, and renders the waters thereof offensive to the senses and unwholesome and unfit for domestic uses"); *People v. Truckee Lumber Co.*, 116 Cal. 397, 48 P. 374, 374 (1897) (upholding an injunction against polluting the Truckee River with "large quantities of refuse matter, consisting of sawdust, shavings, slabs, edgings, waste, and other deleterious substances, the effect of which has been and is to pollute said stream and the waters thereof, and render the same unfit for use, and which substances are poisonous and deleterious to the fish in said stream, and are killing, destroying, and exterminating them"); *Thompson v. Kraft Cheese Co. of Cal.*, 210 Cal. 171, 291 P. 204, 205-06 (1930) (upholding injunction against "emptying, throwing, discharging or permitting to escape, any dirty water, sour milk, slops, refuse, offal, or other liquid or semi-liquid matter, either directly or indirectly, by means of cesspools or otherwise, into said branch of Nicasio creek or directly upon lands of plaintiffs" such as

had caused the plaintiffs' hogs to become "sickly" with a roundworm infestation); *City of Turlock v. Bristow*, 103 Cal.App. 750, 284 P. 962, 964 (1930) (upholding injunction against maintaining open irrigation ditches in city limits "in such a manner as to permit the accumulation of foul and stagnant water, refuse matter, filth, and garbage which became a breeding place for typhoid and other disease germs and permeated the air with noxious, unwholesome, and offensive vapors and odors, rendering the ditch unsanitary, causing the neighborhood to become unhealthful, and destroying the comfort and enjoyment of the homes and property of the citizens of that vicinity"); *Freitas v. City of Atwater*, 196 Cal.App.2d 289, 16 Cal.Rptr. 397, 399 (1961) (upholding injunction against polluting the water of the Atwater Main, when said pollution had resulted in "obnoxious odors" and gases that "burned the eyes" emanating from the water, as well as dead fish). It is certainly true that Lake Tahoe is faced with serious harm, which ought to be prevented if at all possible, but it is not the type of harm contemplated by California nuisance law. No testimony supported the idea that the lake will become a health hazard, or otherwise "indecent" or "offensive." The fact that the lake may turn green and opaque, and be reduced to a pale copy of its current self, is abhorrent to think on – yet not, unfortunately, a "nuisance" as defined by the pre-existing law of California.

Finally, apart from the nuisance issue, there is the possibility that some other "background principle" of California law may prohibit the use to which the plaintiffs wish to put their land. The only law we have found that might provide any basis for a finding that a pre-

existing regulation prohibited certain uses of property is the Porter-Cologne Water Quality Control Act, enacted in 1969, which amended the existing Water Code provisions. As amended, the statute defines "waste" as including "sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation . . . of whatever nature." Cal. Water Code § 13050(d). The code also defines nuisance as anything that "(1) [i]s injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property. . . . [and] (3)[o]ccurs during, or as a result of, the treatment or disposal of wastes." Cal. Water Code § 13050(m). This has been interpreted to mean that "water pollution occurring as a result of treatment or discharge of wastes in violation of Water Code section 13000 et seq. is a public nuisance per se." *Jordan v. City of Santa Barbara*, 46 Cal.App.4th 1245, 54 Cal.Rptr.2d 340, 346 (1996); *Newhall Land & Farming Co. v. Superior Court*, 19 Cal.App.4th 334, 23 Cal.Rptr.2d 377, 381 (1993). The definition of "waste" has been interpreted as including "concentrated silt or sediment associated with human habitation and harmful to the aquatic environment." *Lake Madrone Water Dist. v. State Water Res. Control Bd.*, 209 Cal.App.3d 163, 256 Cal.Rptr. 894, 897 (1989).

However, the facts of our case are nonetheless distinguishable. *Lake Madrone*, which interpreted the Water Code to include "concentrated silt or sediment" as "waste," involved sediment which was concentrated by a dam to the point where, when released, silt up to 18

inches deep was deposited in Berry Creek, "choking its pools and shoreline and clogging its spawning areas so heavily as to destroy fish and aquatic life." *Lake Madrone*, 256 Cal.Rptr. at 895. The one act that was enjoined was the releasing of water from the bottom of the dam, where all the sediment was collected. Thus the relationship between the enjoined act and the damage was much more direct, and the damage much more immediate. Although the runoff at Lake Tahoe may be "associated with human habitation," the statutorily defined nuisance only applies when such "waste" is discharged "during, or as a result of, the *disposal or treatment* of wastes." Simply building a house does not seem to fall within this definition. In *Lake Madrone*, the defendant did commit an act that could be construed as "disposing" of wastes – i.e., opening the gates in the dam and releasing the sediment-choked water into the stream. Thus we hold that the Porter-Cologne Act, although it may have modified California's common law of nuisance, did not so modify it that the activities at issue here could be considered nuisances under that law. (For future reference, though, we note here that even if the Porter-Cologne act were held to constitute a sufficient "background principle" of state law, it might not apply to all of the plaintiffs in this case anyway. Some plaintiffs may well have purchased their land prior to 1969. Those facts are not in the record developed so far.)

Finally, it should be noted that the fact that fish might in the future be threatened in Lake Tahoe as a result of the increased sediment runoff, which was suggested by some of the evidence at trial, does not appear to be enough to prove an existing nuisance. It appears

that actual damages may be necessary before a nuisance can be enjoined. "In California, an action for private nuisance cannot be maintained for an interference in the use and enjoyment of land caused solely by the fear of future injury. . . . Damage or injury has long been considered an essential element of a cause of action for nuisance." *Jordan*, 54 Cal.Rptr.2d at 346. Thus we cannot hold that anything "inhere[d] in the title" of the plaintiffs' properties that would prevent the construction of single-family homes thereon. *Lucas*, 505 U.S. at 1029, 112 S.Ct. 2886.

In Nevada, there is no case law on pollution of water as a nuisance. As in California, nuisance is defined by statute as:

> Except as otherwise provided in this section, anything which is injurious to health, or indecent and offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property. . . .

N.R.S. 40.140(1). The California statute was first adopted in 1872; the Nevada statute in 1911. Given the Nevada Supreme Court's preference for interpreting statutes adopted nearly verbatim from other states in light of the other state's case law existing at the time of adoption, *Peke Resources, Inc. v. Fifth Judicial Dist. Court In and For the County of Esmeralda*, 113 Nev. 1062, 944 P.2d 843, 847 (1997), the Nevada statute would probably be interpreted much along the lines of the early California cases, under which, as we have seen, this case would clearly not constitute a nuisance.

As in California, there is one law in Nevada that could conceivably provide a basis for a finding that some other "background principle" of Nevada law prohibited construction on the plaintiffs' land – that is, the "Nevada Water Pollution Control Law," originally passed in 1973, and currently codified at N.R.S. 445A.300-445A.730. Section 445A.325 defines "contaminant" as "any physical, chemical, biological or radiological substance or matter which is added to water." Section 445A.400 defines "pollutant" as "dredged soil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and agricultural waste discharged into water." This definition seems even less likely to encompass the erosion runoff at issue here than California's definition. Thus we do not interpret this statute to prohibit the construction of single-family homes on the plaintiffs' property.

Finally, with respect to both Nevada and California, we note that we have assumed thus far that all current plaintiffs purchased their land prior to the enactment of 81-5. Should this not be the case for any individual plaintiff, we think that such a plaintiff would be barred from receiving damages. Ordinance 81-5 and the following actions would appear to constitute a "background principle of state law" applicable to all subsequent purchasers, who are presumed to have knowledge of all such restrictions. Therefore, we hold that the defendants have not proven that the "nuisance exception" to the categorical takings rule of *Lucas* should apply here.

IT IS THEREFORE HEREBY ORDERED that TRPA shall pay damages to the plaintiffs for the period from August 24, 1981, to April 25, 1984, except as to the Nevada-side Class 1-3 plaintiffs, as to whom TRPA shall pay damages only for the period from August 27, 1983, to April 25, 1984.

TAHOE-SIERRA PRESERVATION COUNCIL, INC., et al., Plaintiffs,

v.

TAHOE REGIONAL PLANNING AGENCY, et al., Defendants.

No. CV-N-84-257-ECR.

United States District Court,
D. Nevada.
Jan. 28, 1998.

Lawrence L. Hoffman, Law Offices of Lawrence L. Hoffman, Tahoe City, CA, for Plaintiffs.

Rachelle J. Nicolle, Susan E. Scholley, Tahoe Regional Planning Agency, Zephyr Cove, NV, J. Thomas Susich, Vicki E. Hartigan, Crowell, Susich, Owen & Tackes, Ltd., Carson City, NV, for Tahoe Regional Planning Agncy.

William Frey, Deputy Attorney General, Carson City, NV, for State of Nevada.

Mary J. Schoonover, Richard M. Frank, California Department of Justice, Sacramento, CA, for State of California.

ORDER

EDWARD C. REED, JR., District Judge.

Currently before the Court are five motions filed by the defendants under cover of one document (# 250), filed on August 15, 1997. Plaintiffs filed a response to these motions (# 251) on October 6, 1997, to which defendants filed a reply (# 252) on October 30, 1997. Each of

these five motions will be dealt with in separate orders. The subject of the instant order is Motion No. 3, which for the reasons set forth below is hereby GRANTED.

MOTION NO. 3

Motion No. 3[1] is for an order dismissing "all plaintiffs' claims which challenge the 1987 Regional Plan."

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[1] This case has been pending for almost fourteen years, and has generated at least seven *published* opinions so far. Since the procedural history and the facts of this case have been set forth in more than one of these previous opinions, we feel it is unnecessary to recite them again here. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 611 F.Supp. 110 (D.Nev.1985), *aff'd in part, vacated in part, and rev'd in part by Tahoe Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 911 F.2d 1331 (9th Cir.1990); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 638 F.Supp. 126 (D.Nev.1986), *vacated, Tahoe Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 911 F.2d 1331 (9th Cir.1990); *Tahoe Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 911 F.2d 1331 (9th Cir.1990) (*"TSPC I"*), *cert denied, Tahoe Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 499 U.S. 943, 111 S.Ct. 1404, 113 L.Ed.2d 459 (1991); *Tahoe Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 938 F.2d 153 (9th Cir.1991) (*"TSPC II"*) (reviewing unpublished decisions of the District Court for the Eastern District of California); *Tahoe Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 808 F.Supp. 1474 (D.Nev.1992) (Nevada-side case) *aff'd in part and rev'd in part by Tahoe Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 34 F.3d 753 (9th Cir.1994); *Tahoe Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 808 F.Supp. 1484 (D.Nev.1992) (California-side case) *aff'd in part and rev'd in part by Tahoe Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning*

Defs.' Mem. of P. & A. in Supp. of Mot. Dismissing All Claims as to 1987 Reg'l Plan (Mot.# 3) at 1. The basis for this motion is that these claims are all barred by the statute of limitations. Given the Ninth Circuit's statement, in its most recent decision in this case, that "[n]o part of TSPC's § 1983 claim is time-barred," *Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 34 F.3d 753, 756, amended by 42 F.3d 1306 (9th Cir.1994) (*"TSPC III"*), the defendants' motion would appear to be doomed.

However, the defendants argue that this part of the Ninth Circuit's holding in *TSPC III* is "clearly erroneous and would work a manifest injustice," and is thus not binding under the law of the case doctrine. Defs.' Mem. of P. & A. in Supp. of Mot. Dismissing All Claims as to 1987 Reg'l Plan (Mot.# 3) at 5. Given the long and complicated history of this case, it would not be at all surprising if a mistake – even a "clearly erroneous" one – had been

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Agency, 34 F.3d 753 (9th Cir.1994); *Tahoe Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 34 F.3d 753 (9th Cir.) (*"TSPC III"*), *amended by Tahoe Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 42 F.3d 1306 (9th Cir.1994), *cert denied, California v. Tahoe Sierra Preservation Council*, 514 U.S. 1036, 115 S.Ct. 1401, 131 L.Ed.2d 288 (1995).

After *TSPC III* was decided and the case remanded to us for the second time, the defendants filed answers, and the parties slowly began to prepare for an actual trial. Pursuant to an order of this Court dated February 13, 1997, (# 225) the defendants filed five pretrial motions, including the one under discussion here. Although this motion is not characterized as such by the defendants, it would appear to be, in essence, a motion for partial judgment on the pleadings, as provided for by Fed.R.Civ.P. 12(c).

made somewhere along the way. Since justice demands that, to the extent possible, we correct such mistakes, we are required to examine the defendants' claim to determine if a "clearly erroneous" mistake has in fact been made.

The plaintiffs, naturally, emphasize heavily in their response to this motion the Ninth Circuit's holding that "[n]o part of TSPC's § 1983 claims is time-barred." Pls.' Resp. to Mot. No. 3 at 22, citing *TSPC III* at 756. They characterize the dispute over which statute of limitations applied to their § 1983 challenges as a "hotly-debated issue" until it was resolved by the Ninth Circuit in *TSPC III*. *See* Pls.' Resp. to Mot. No. 3 at 23. No doubt this is true, although it should be noted that the issue was never debated at all (hotly or otherwise) before this Court – it was apparently raised for the first time in the opening brief that the plaintiffs filed with the Ninth Circuit in 1993, in appealing our 1992 decision to dismiss the First Amended Complaints. *See* Opening Br. of Appellants, No. 93-15113 & No. 93-15114, at 28-33 (dated Apr. 26, 1993), *attached as* Ex. D to Defs.' Reply Mem. in Supp. of Five Pretrial Mots. (doc. # 252) [hereinafter Pls.' 1993 Opening Br.]. However, it is certainly true that the issue's import extends beyond this case – the Tahoe Regional Planning Agency ("TRPA") has faced, and no doubt will continue to face, numerous other challenges to its regulations and ordinances.

The plaintiffs state that the Ninth Circuit's resolution of the issue "is, of course, controlling law in this case, and it is simply not susceptible to being set aside by this Court, even if it should not agree with that holding." Pls.' Resp. to Mot. No. 3 at 23. However, it is *not* the Ninth

Circuit's ruling on the issue of which statute of limitations should be applied to TSPC's § 1983 challenges[2] that

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[2] While it is unnecessary to examine the issue in much depth here, in brief the question was whether TSPC's § 1983 takings challenges were subject to the same statute of limitations as other § 1983 claims, or rather the statute of limitations set forth in the Tahoe Regional Planning Compact (the "Compact") which had created TRPA, and which provided that all challenges to plans, regulations, or ordinances adopted by TRPA should be brought within sixty days. Cal. Gov't Code § 66801, Art. VI(j)(4) (West 1997); Nev.Rev.Stat. § 277.200, Art. VI(j)(4) (1997). While the opinion in *TSPC III* makes the outcome seem forgone, that was not entirely the case. As an "Agreement of Compact" between the states of Nevada and California, the Compact had to be approved by the Congress of the United States. U.S. Const. art I, § 10, cl. 3. Congress granted its initial approval to the Compact on December 18, 1969. Pub.L. 91-148, 83 Stat. 360. Hence, the Compact is *federal* law. *See League to Save Lake Tahoe v. Tahoe Reg'l Planning Agency*, 507 F.2d 517 (9th Cir.1974). As the Supreme Court pointed out in *Wilson v. Garcia*, the case which first made clear that § 1983 claims are best characterized as analogous to personal injury claims and should thus be subject to the state statute of limitations for personal injury claims, the resort to state law was only the second step that Congress had mandated in interpreting the Reconstruction Civil Rights Acts, of which § 1983 is a part. The first step was to "look to the laws of the United States." *Wilson v. Garcia*, 471 U.S. 261, 267, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985). "[R]esort to state law – the second step in the process – should not be undertaken before principles of federal law are exhausted." *Id.* at 268. And "state law shall only apply 'so far as the same is not inconsistent with' federal law." *Id.* at 269. Since applying state law personal injury statutes of limitations to TRPA's actions is inconsistent with federal law – i.e., the Compact – it does not seem unreasonable to think that Congress, in approving the Compact, might have intended the sixty-day limitations period to apply in this type of situation. Nonetheless, we do not mean to suggest (anymore than do the defendants, as we understand their

the defendants claim is wrong. Rather, it is the Ninth Circuit's holding that the defendants *waived their ability to raise* the correct statute of limitations.

If the defendants are correct, and they have not waived this defense, then the plaintiffs' attempt to state a cause of action against the 1987 Regional Plan in their amended complaints is as time-barred by the correct statute of limitations as we previously held it to be by the sixty-day statute of limitations provided in the Compact. *See Tahoe Sierra Preservation Council, Inc.*, 808 F.Supp. at 1482-83; *Tahoe Sierra Preservation Council, Inc.*, 808 F.Supp. at 1491. Over four years had passed between July 1, 1987, the effective date of the 1987 Plan, and October 28, 1991, the date on which the plaintiffs filed the earlier of their two amended complaints. Since the plaintiffs' claims are facial challenges, the effective date of the Plan is when their cause of action accrued and the statute of limitations began to run. *TSPC III*, 34 F.3d at 755; *see also Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 688 (9th Cir.1993).Thus, since the statute of limitations for § 1983 claims is one year in California, *Levald*, 998 F.2d at 688, and two years in Nevada, *Perez v. Seevers*, 869 F.2d 425, 426 (9th Cir.1989),[3] it is indisputable that the plaintiffs did

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argument) that the Ninth Circuit decision on this issue was in any way incorrect. *Wilson v. Garcia* certainly did state that § 1983 "is fairly construed as a directive to select, in each state, the one most appropriate statute of limitations for all § 1983 claims." *Id.* at 275. We merely point out that the defendants were not just willfully ignoring the only viable statute of limitations in favor of some obviously inapplicable one.

[3] These are the statute of limitations periods for § 1983 claims accruing after the 1985 Supreme Court decision of *Wilson*

not bring their claims against the 1987 Plan within what is now clear is the appropriate statute of limitations

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v. Garcia, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985) (holding that the statute of limitations for § 1983 claims accruing in a state is that state's statute of limitations for personal injuries), discussed *supra* note 2. Since the instant motion involves only the plaintiffs' claims against the 1987 Plan (which, despite the plaintiffs' best efforts to argue otherwise, cannot be seen as having accrued any *earlier* than 1987), we do not need to be concerned here with what the statute of limitations is for § 1983 claims which accrued prior to *Wilson* – except to note that, at least in 1984, when the plaintiffs initially filed this action, it was probably three years in both California and Nevada. *Golden Gate Hotel Ass'n v. San Francisco*, 18 F.3d 1482, 1485 (9th Cir.1994); *Mason v. Schaub*, 564 F.2d 308, 309 (9th Cir.1977). However, as late as November 1991, the Ninth Circuit indicated that the appropriate statute of limitations for takings claims in California was either five or six years. *Azul Pacifico, Inc. v. Los Angeles*, 948 F.2d 575, 587 (9th Cir.1991) ("*Azul I*"). Either way, the plaintiffs' 1987 Plan claims would have been timely filed. While the *Azul I* decision was withdrawn and replaced on July 23, 1992, *Azul-Pacifico, Inc. v. Los Angeles*, 973 F.2d 704 (9th Cir.1992) ("*Azul II*"), it is important to note that all of the defendants' motions to dismiss the amended complaints were filed while *Azul I* was the law in this circuit. Def. Tahoe Reg'l Planning Authority's Mot. to Dismiss Pls.' First Am. Compls. for Inverse Condemnation, Denial of Const. and Civ. Rights, and Just Compensation and Damages (Fed.R.Civ.P. 12[b][6]) (filed May 27, 1992) (doc. # 140); Def. State of California's Mot. to Dismiss Pls.' First Am. Compls. for Inverse Condemnation, Denial of Const. and Civ. Rights, and Just Compensation and Damages (Fed.R.Civ.P. 12[b][6]) (filed June 12, 1992) (doc. # 145); Def. State of Nevada's Mot. to Strike (filed June 12, 1992) (doc. # 147). For an example of the impact of this confusion on other takings cases pending at the time, see *Golden Gate Hotel Ass'n v. San Francisco*, 18 F.3d 1482 (9th Cir.1994). It is also interesting to note that one reason for the *Azul I* court's decision was that, apparently, the plaintiff in that case had not

period. Unless the defendants have in fact waived their ability to raise the correct statute of limitations as a defense, therefore, all of the plaintiffs' claims against the 1987 Plan will be time-barred.[4]

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brought its takings claims as § 1983 claims, but rather as independent claims that its constitutional rights had been violated. *Azul II* thereafter also clarified that all takings claims and other claims for constitutional violations MUST BE BROUGHT UNDER § 1983. *Azul II*, 973 F.2d at 705 ("Plaintiff has no cause of action under the United States Constitution. We have previously held that a litigant complaining of a violation of a constitutional right must utilize 42 U.S.C. § 1983."). This raises the question of just what, exactly, was dismissed in *TSPC III* when the Ninth Circuit dismissed all of the plaintiffs' "takings claims" as barred by the sixty-day Compact statute of limitations, but held that its "§ 1983 claims" were not time-barred. *TSPC III*, 34 F.3d at 755.

[4] Of course, if the plaintiffs' claims against the 1987 Plan somehow "related back" to their original complaints, as provided by Fed.R.Civ.P. 15(c), then it would not matter that the claims were not filed within the appropriate statute of limitations period. However, both this Court and the Ninth Circuit have already held that the 1987 Plan did not arise from the same conduct, transaction, or occurrence as the regulations at issue in the original complaints, and so cannot relate back to those complaints. *TSPC III*, 34 F.3d at 755 ("This court has already determined that the 1987 Plan was markedly different from its 1984 predecessor. . . . Accordingly, the 1987 Plan cannot be considered the same transaction or occurrence as the 1984 plan, within the meaning of Fed.R.Civ.P. 15(c)."); *Tahoe Sierra Preservation Council, Inc.*, 808 F.Supp. at 1482-83; *Tahoe Sierra Preservation Council, Inc.*, 808 F.Supp. at 1491. Hence, to escape the statute of limitations problem, the plaintiffs should have filed for redress of their 1987 Plan claims by July 1, 1988, in California, and July 1, 1989, in Nevada. Of course, we undoubtedly would still have held on initial review that their claims were barred by the sixty-day Compact statute of

The key issue of whether the defendants waived their ability to raise the correct statute of limitations as a defense was not raised before this Court prior to the instant motion. This was undoubtedly due to the fact that, in arguing over the defendants' motions to dismiss the First Amended Complaints, the only statute of limitations ever proposed was the sixty-day one. The arguments centered around whether any of the plaintiffs' claims were barred by that statute of limitations, not whether another statute of limitations would be more appropriate. *See, e.g.*, Defs.' Mem. of P. & A. in Supp. of Def. Tahoe Reg'l Planning Agency's Mot. to Dismiss Pls.' First Am. Compls. (filed May 27, 1992) (doc. # 141); Pls.' Mem. of P. & A. in Opp'n to All Defs.' Mots. to Dismiss and Related Mots. (filed Aug. 18, 1992) (doc. # 155).

It appears that the plaintiffs did raise the question of whether another limitations period would be more appropriate, but they did not do so until they filed their opening brief with the Ninth Circuit in their appeal of our 1992 decisions. *See* Pls.' 1993 Opening Br. at 28-33. But the *waiver* issue, at least as it is before us now, does not appear to have been raised by the parties at all, even on appeal. Of course, our record of what transpired on appeal is incomplete – we have only been provided with some of the briefs filed by the parties, and we do not have the transcript of oral arguments before the Circuit. But what we do have suggests that, while the word "waiver" does appear in the plaintiffs' briefs, they were using it in a different sense, and not at all with respect to

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limitations, but at least now the plaintiffs' claims would clearly be timely.

the defendants' argument that the 1987 Plan claims were time-barred. *See, e.g.*, Plaintiffs' 1993 Opening Brief at 27-28.

One of the plaintiffs' arguments was that, since the defendants had failed to "cross-appeal" the time-bar issue in either of the two earlier appeals, they had somehow waived those defenses. *Id.* However, neither district court had ruled that the sixty-day Compact statute of limitations was inapplicable to § 1983 actions, so failing to "cross-appeal" that issue would not appear to constitute a waiver of any sort. In addition, the plaintiffs argued that the earlier Ninth Circuit decisions had conclusively resolved the time-bar issue in their favor, thus preventing the defendants from raising it again in *TSPC III*. *Id.* However, the idea that either *TSPC I* or *TSPC II* resolved the time-bar issue is ludicrous. Both opinions specifically state that they "express no view" on the issue. *TSPC I*, 911 F.2d at 1342 n. 11 ("We express no view on any of the possible statute of limitations issues that might be raised."); *TSPC II*, 938 F.2d at 158 ("We express no view on the time-bar issue. . . . "). Even if either of these arguments had any validity in regard to the Ordinance 81-5 or Resolution 83-21 claims, however, they have no impact on the 1987 Plan claims at issue here. No claims against the 1987 Plan were raised by the plaintiffs until they filed their First Amended Complaints, after both *TSPC I* and *TSPC II* had been decided – so nothing that had or had not been argued in those appeals would prevent the defendants from raising any defenses to the newly filed 1987 Plan claims.

However, even though the parties had not addressed the issue of whether the defendants had waived any

defenses to the 1987 Plan claims, the Ninth Circuit held that the defendants had waived their right to raise any statute of limitations but the sixty-day Compact one as a defense. The Circuit's holding on this point consists of only three sentences: "The defendants did not plead any other statute of limitations except the 60-day one. Failing to plead affirmatively any other statute of limitations, they cannot now rely on any other. No part of TSPC's § 1983 claim is time-barred." *TSPC III*, 34 F.3d at 756. It is this limited part of the Ninth Circuit's holding in *TSPC III* that the defendants claim should not be treated as law of the case.[5]

"Under the 'law of the case' doctrine, 'a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case.' " *U.S. v. Alexander*, 106 F.3d 874, 876 (9th Cir.1997) (quoting *Thomas v. Bible*, 983 F.2d 152, 154 (9th Cir.1993)). "A court may have discretion to reopen a previously resolved question only where (1) the first decision was clearly erroneous; (2) an intervening change in

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[5] Of course, the most reasonable explanation of this language may be that it is simply dicta, and as such has no preclusive force under the law of the case doctrine. *Milgard Tempering, Inc. v. Selas Corp. of America*, 902 F.2d 703, 716 (9th Cir.1990). After all, the issue of waiver was not before the court, so no holding on the question was necessary to resolve the appeal. However, the plaintiffs have argued strenuously that *TSPC III* resolved the issue conclusively, for ever and always. Thus, in order to address the plaintiffs' arguments, we have not treated this language as dicta. If it is dicta, then the following discussion of the law of the case doctrine is unnecessary – however, we note that our subsequent discussion and resolution of the waiver question itself would be necessary either way.

the law has occurred; (3) the evidence on remand is substantially different; (4) other changed circumstances exist; or (5) a manifest injustice would result." *Disimone v. Browner*, 121 F.3d 1262, 1266 (9th Cir.1997). It is the first exception that is at issue here. The defendants claim that this part of the Ninth's Circuit's decision is "clearly erroneous," and, for the following reasons, we agree.

At the time the Ninth Circuit heard the appeal in *TSPC III*, none of the defendants had ever filed an answer, or any other type of pleading. The Federal Rules of Civil Procedure define the types of papers which are considered pleadings, and a 12(b)(6) motion to dismiss is not one of them. Only the following are considered pleadings: a complaint, an answer, a reply to a counterclaim, an answer to a cross-claim, a third-party complaint, a third-party answer, and a reply to an answer or to a third-party answer. Fed.R.Civ.P. 7(a). In most cases, the first *pleading* a defendant will file is its answer, although that may not be the first *document* to be filed. Often, a defendant will file an answer only after a pre-answer motion to dismiss has been filed and denied. Since *TSPC III* was an appeal from the *grant* of a 12(b)(6) motion to dismiss, the defendants never really had the opportunity to file an answer. Thus it was clearly wrong to say that the defendants had waived their right to raise other statute of limitations defenses *by not pleading them*, since up to that point the defendants had not *pled* anything at all, and had not been required to plead anything at all.

Of course, it is understandable that the Circuit might not have realized that, *ten years* into the litigation, the defendants had never actually *answered* the complaints. But such was indeed the case. In fact, the defendants

never filed answers to the original complaints, and only filed answers to the First Amended Complaints in 1995, after the *TSPC III* decision had been issued. Instead, in response to both the original complaints and the First Amended Complaints, the defendants filed motions to dismiss. Since these motions were granted by the district courts, the defendants were not required to file answers until after the Ninth Circuit had reviewed and remanded the cases. Thus it is obvious that the first *pleadings* of any kind filed by any of the defendants were the answers filed in July 1995 – in which the defendants raised as a defense the statute of limitations. Defs.' Answer to First Am. Compl. for Inverse Condemnation, Denial of Const. & Civ. Rights, & Just Compensation & Damages (Nevada plaintiffs) (filed July 7, 1995) (doc. # 199) [hereinafter Nevada-side Answer]; Defs.' Answer to First Am. California-side Compl. for Inverse Condemnation, Denial of Const. & Civ. Rights, & Just Compensation & Damages (California plaintiffs) (filed July 7, 1995) (doc. # 198) [hereinafter California-side Answer].

Therefore, with all due respect to the Ninth Circuit, we are constrained to find that the Circuit's holding in *TSPC III* that the defendants had waived their right to raise the correct statute of limitations as an affirmative defense *because they had not pled it* is clearly erroneous, and was almost certainly premised on the mistaken – but understandable – assumption that at some point during the ten years the case had then been pending the defendants must have filed a responsive pleading of some kind.

Since the Ninth Circuit's decision that the defendants waived their right to raise the correct statute of limitations as a defense by not pleading it was clearly wrong, we must now address the question of whether the defendants may have waived their right to raise this defense in some other way. To do otherwise would be to ignore the possibility that, while the Circuit's *reasoning* was clearly erroneous, its *result* was correct. Since this question was not presented to us prior to the *TSPC III* appeal, we do not have a decision on which to fall back for guidance, and must therefore start from the beginning in examining this question.

The answer to the question of waiver would appear to lie squarely within the terms of the Federal Rules of Civil Procedure. Rule 8(c), subtitled "Affirmative Defenses," states that: "In pleading to a preceding pleading, a party shall set forth affirmatively . . . statute of limitations . . . and any other matter constituting an avoidance or affirmative defense." Fed.R.Civ.P. 8(c). This Rule has often been held to mean that, if a party files a "pleading to a preceding pleading" (usually an answer to a complaint), and does not include an affirmative defense therein, that defense will be considered waived. 5 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1278, at 477 ("Generally, a failure to plead an affirmative defense results in the waiver of that defense and its exclusion from the case."); *see also United States Postal Serv. v. American Postal Workers Union*, 893 F.2d 1117 (9th Cir.1990) (holding that failure to plead six-month statute of limitations, or otherwise assert the defense in district court, waived the defense); *Cooperative Finance Ass'n, Inc. v. Garst*, 917 F.Supp. 1356, 1385 (N.D.Iowa 1996) ("Courts

have held that failure to plead an affirmative defense to a claim in a responsive pleading waives or forecloses assertion of that defense for the first time later in the litigation, usually finding authority for this conclusion in Fed.R.Civ.P. 8(c), which specifically requires the pleading of affirmative defenses in responsive pleadings."). Thus the Ninth Circuit would clearly have been in accordance with the Rules to hold that, by not pleading an affirmative defense, the defendants had waived it – *if* they had filed a pleading from which such a defense could have been omitted.

However, even that holding, while consistent with the rules, would have conflicted with previous Ninth Circuit cases. Many courts, including the Ninth Circuit, have liberalized the rule that omitting a defense from the answer waives it, and have allowed parties to raise various affirmative defenses (including the statute of limitations) at any time up to and including trial – so long as the other party was not prejudiced by the delay in raising the defense. *See, e.g., Magana v. Commonwealth of the Northern Mariana Islands*, 107 F.3d 1436, 1446 (9th Cir.1997) ("We have liberalized the requirement that defendants must raise affirmative defenses in their initial pleadings. However, defendants may raise an affirmative defense for the first time in a motion for summary judgment only if the delay does not prejudice the plaintiff."); *Han v. Mobil Oil Corp.*, 73 F.3d 872, 877 (9th Cir.1995) (stating that "we have ruled that an affirmative defense based on the lapse of a statutory limitation period may be raised for the first time on a motion for summary judgment when there is no prejudice to the plaintiff"); *Rivera v. Anaya*, 726 F.2d 564, 566 (9th Cir.1984) (holding that

defendant's "initial failure to raise the statute of limitations in his initial pleading does not preclude him from making a motion for summary judgment based on that defense").

The instant case, of course, is different, in that the statute of limitations defense *was* raised in the answers. Nevada-side Answer para. 43, at 13; California-side Answer para. 43, at 12. The defendants are not seeking to raise the defense for the first time after omitting it from a responsive pleading. The apparent problem here is that the defendants raised the defense in their answer *after not asserting it in a pre-answer motion to dismiss*. Of course, common sense would indicate that, if a party can be excused for omitting an affirmative defense from a document in which the Federal Rules mandate that such a defense be included, a party should also be excused for omitting an affirmative defense from a document in which such a defense is *not* mandated to appear, by the Federal Rules or any other authority. Unfortunately, as is often the case, our analysis cannot end with common sense.

To continue, the Rules themselves also seem to indicate that it would not matter if a defendant filed a pre-answer motion without including the affirmative defense of the statute of limitations – the defense would still not be waived. Rule 12(b) states that:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be

> made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. . . .

Fed.R.Civ.P. 12(b).

To begin with, it should be obvious that the defense of statute of limitations is not listed in this rule. Some courts have therefore questioned whether it is even permissible to raise such a defense in a pre-answer 12(b) motion. *See, e.g.*, 5 Wright & Miller § 1277, at 461-62 ("Numerous cases state that the affirmative defenses listed in Rule 8(c) . . . must be asserted in defendant's answer and cannot be the basis for a motion to dismiss the complaint. . . . "). However, most courts have held that the statute of limitations defense, as well as other non-enumerated defenses, may fall within the scope of 12(b)(6), and thus is appropriately raised in a 12(b)(6) motion. *See, e.g., Ledesma v. Jack Stewart Produce, Inc.*, 816 F.2d 482, 484 n. 1 (9th Cir.1987) ("Although the statute of limitations defense is usually raised in a responsive pleading, see Fed.R.Civ.P. 8(c), the defense may be raised in a motion to dismiss if the running of the statute is apparent from the face of the complaint."); *see also* 2 Moore's Fed. Prac.3d § 12.34[4][b], at 12-73 (1997) ("Dismissal under Rule 12(b)(6) may also be appropriate when

a successful affirmative defense or other bar to relief appears on the face of the complaint, such as . . . the statute of limitations."). In other words, if a complaint raises only claims which are barred by the statute of limitations, then the complaint "fail[s] to state a claim upon which relief can be granted."

However, the fact that the defense *may* be raised in a pre-answer motion does not necessarily mean that it *must* be. Rules 12(g) and 12(h) answer this question, at least for the defenses listed in 12(b). Rule 12(g) reads as follows:

> A Party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

Fed.R.Civ.P. 12(g). Rule 12(h) reads in relevant part as follows:

> (1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule not included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

> (2) A defense of *failure to state a claim upon which relief can be granted*, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim *may be made in any pleading* permitted or ordered under Rule 7(a), *or by motion for judgement on the pleadings, or at the trial on the merits.*
>
> . . .

Fed.R.Civ.P. 12(h) (emphasis added).

Therefore it would seem that, if it is indeed appropriate to raise a statute of limitations defense in a 12(b)(6) motion, then that defense is not waived even if omitted from a pre-answer motion filed to assert other defenses. The fact that Rule 12(h)(2) allows a defense of failure to state a claim to be raised for the first time even at trial is in accord with the tendency of most courts to allow the affirmative defenses listed in Rule 8(c) to be raised even after being omitted from the answer (see discussion, *supra*).

Therefore it would appear from the Rules that omitting a statute of limitations defense from a pre-answer motion will not waive that defense. The Second Circuit seems to be the only circuit that has addressed this exact issue, and it has reached the same conclusion. In *Santos v. District Council of New York City*, members of one union sued a related union for enforcement of an arbitration award, and the district court dismissed for lack of jurisdiction. This decision was appealed to the Second Circuit, which remanded the case to the district court. It was only after the case was remanded that the defendant filed its answer, wherein it claimed that the suit was barred by the statute of limitations. The plaintiffs argued that the

defendant had waived the defense of statute of limitations by not raising it in the pre-answer motion it had filed to assert lack of jurisdiction. The Second Circuit found that the defense had not been waived, and that a "statute of limitations defense need not be raised in a pre-answer motion." *Santos v. District Council of New York City*, 619 F.2d 963, 967 (2d Cir.1980). In a footnote, the court explained that a statute of limitations defense *may* be raised in a 12(b)(6) motion, and as a 12(b)(6) defense, which "may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at trial on the merits," *id.* at 967 n. 4, is "by the express terms of Rule 12(g) . . . not waived by a failure to include it in a Rule 12 motion raising other defenses." *Id.*

The Second Circuit re-affirmed *Santos* in a more recent case, *Kulzer v. Pittsburgh-Corning Corp.*, 942 F.2d 122 (2d Cir.1991). In *Kulzer*, although the defendant had pled the statute of limitations as an affirmative defense, it had not raised it in any pre-trial motions, and apparently did not move for dismissal of the case on the grounds that it was time-barred until after the close of the plaintiff's proof at trial. *Id.* at 124.The district court denied the motion, essentially holding that the defendant had waived the defense by not asserting it more forcefully. The Second Circuit reversed, based on *Santos*, holding that the defendant had met the minimum requirements of the Federal Rules, and so had not waived its right to raise the defense. *Id.* at 125.

However, at least one other court has reached this issue, and it arrived at a contrary holding. In *Grijalva v. Shalala*, 1995 WL 523609 (D.Ariz.1995), the court held that

the defendants had waived the statute of limitations even though they had *never* filed an answer. *Id.* at *6. The court cites to Fed.R.Civ.P. 8(c) and 12(h)(1) for the proposition that failing to raise the statute of limitations in a responsive pleading will result in waiver, but then goes on to state: "Defendant not only omitted the argument from her responsive memorandum here, she failed to raise the limitation issue in her Motion to Dismiss, ruled on by this Court December 15, 1994. Defendant has not filed her Answer. The Court finds that Defendant is untimely in raising this defense." *Id.* This would seem to be as blatant an error as the Ninth Circuit made in *TSPC III*. However, while the decision purports to rest on the Federal Rules, it seems as if the court was motivated more by a kind of equitable tolling argument. For one thing, the case involved elderly Medicare beneficiaries alleging that the Secretary of Health and Human Services had allowed various HMOs to deny them medical benefits. For another, the statute of limitations defense, even if successful, would not have disposed of the entire case – what was at issue was the size of the class that the plaintiffs were attempting to certify. In defining the class, the court had already waived the exhaustion of remedies requirement, and might well have waived the statute of limitations defense no matter how early the defendant had asserted it, given the equities involved. *Id.* at *3. Finally, since the individual plaintiffs were not seeking benefits from the suit, but rather sought injunctive and declaratory relief to force the Secretary to monitor and sanction HMOs effectively, the size of the class mattered only in so far as more individuals with claims would help prove an "unlawful pattern or practice by [the federal government]

of ignoring abuses by HMOs." *Id.* at *2. Thus this case is hardly strong authority for the proposition that omitting an affirmative defense from a pre-answer motion will waive that defense.

Of course, it is true that, while we have assumed for purposes of the discussion so far that the supposedly waived statute of limitations defense was omitted from the defendants' motion to dismiss, this might not be entirely true. Certainly, if each possible statute of limitations that might apply to a case is treated as a separate defense to be individually raised or omitted, then the defense was unquestionably omitted. The only statute of limitations raised by the defendants in their motion was the sixty-day one. However, if the defense is regarded as simply that "the plaintiffs' claims are time-barred," then it could be said that the defendants *did* in fact raise this defense in their motion to dismiss. In fact, the defendants have been arguing strenuously, for years, that the plaintiffs' claims were time-barred – they have just been citing the wrong statute of limitations in support of their argument. Whether this is a good argument or a bad one from the defendants' point of view is debatable. On the one hand, viewing the defense as having been raised in the motion to dismiss would seem to preclude even more unquestionably the idea of its having been waived. On the other hand, if the issue is seen as having been raised, it could also be seen as having been sufficiently addressed. Or rather, it might seem that, since so much time and effort have already been spent on the statute of limitations issue, it would somehow be unfair for the defendants to raise an argument in support of that

defense now that might have resolved the question long ago had they raised it when the issue was first discussed.

This sort of vague fairness argument actually seems to have persuaded a few courts. *See United States Postal Service v. American Postal Workers Union*, 893 F.2d 1117, 1122 (9th Cir.1990) ("The APWU failed affirmatively to plead or assert the six-month statute of limitations as a defense in the district court. . . . Moreover, the APWU did not rely on the six-month limitations period in opposing the USPS' motion for summary judgment.It relied solely on the California 100-day limitations period. . . . Accordingly, the six-month limitations period was waived as a defense and we will not consider it on appeal."); *cf. Kulzer v. Pittsburgh-Corning Corp.*, 942 F.2d 122, 124 (2d Cir.1991) (reversing the district court's finding that the defendant "was 'estopped from raising [the statute of limitations defense] as it seeks to do, mid-way through the trial, after the plaintiff has closed her case- . . . . The defendants have simply waited too long and have brought this motion too late in this trial to benefit from a statute of limitations which was never properly pleaded.' ")

However, the majority of courts that have considered this issue – that is, whether a party that initially raised an incorrect statute of limitations as a defense should be allowed to raise the correct one at a later stage of the proceedings – have allowed the correct statute of limitations to be raised. *See, e.g., Zotos v. Lindbergh School District*, 121 F.3d 356, 360 (8th Cir.1997)' ("Zotos also argues that the District waived application of the 90-day limitation period by relying on the two-year statute of limitations in its memorandum in support of its summary

judgment motion. Again, we disagree."); *Yoder v. Honeywell, Inc.*, 104 F.3d 1215, 1224 n. 3 (10th Cir.1997) (holding that the defendant "did not waive the statute of limitations defense simply by pleading the defense based on the wrong choice of law"); *Reconstruction Finance Corp. v. Tuolumne Gold Dredging Corp.*, 137 F.Supp. 855, 862-63 (N.D.Cal.1953) (holding that a plaintiff who had pleaded the wrong statute of limitations was not barred from subsequently relying on the correct one), *aff'd sub nom. Walter W. Johnson Co. v. Reconstruction Finance Corp.*, 230 F.2d 479 (9th Cir.1956). In fact, some courts have even dismissed claims based on affirmative defenses never raised by the defendant at all, so long as the defendant had not waived the defense. *See, e.g., Yoder*, 104 F.3d at 1224-25 (upholding dismissal, based on New York statute of limitations, of defendant who had only pleaded Colorado statute of limitations); *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, (9th Cir.1993) (holding that even after defendant's motion to dismiss on statute of limitations grounds was denied, defendant's inclusion of defense in answer preserved defense, so that in second motion to dismiss brought on other grounds, court could rely on statute of limitations defense to dismiss case); *Costlow v. Weeks*, 790 F.2d 1486, 1488 (9th Cir.1986) (dismissing case for improper venue even though defendants had not raised the defense, since the defendants "have not yet filed a responsive pleading to the Costlows' complaint and their time to do so has not yet expired. They have not, therefore, waived their right to object to the action's improper venue. . . . ").

This fits with what seems to be the general trend for how specifically the statute of limitations defense must be

pleaded (when and if it is pleaded). Most courts have held, in keeping with the general liberality of pleading requirement of the Federal Rules, that simply asserting that "the plaintiff's claim is barred by the applicable statutes of limitations" is sufficient to raise any and all statutes of limitations that might be applicable. *Zotos*, 121 F.3d at 361 (holding that answer which simply stated that plaintiffs' claims "were barred by 'the applicable statute of limitations' " sufficiently raised the defense); *Dangerfield Island Protective Society v. Babbitt*, 40 F.3d 442, 444-45 (D.C.Cir.1994) (holding that "the government adequately pleaded the limitation defense in its answer, which reads in part: 'Plaintiffs' claims are barred by the statute of limitations' "); *Kulzer*, 942 F.2d at 125 (stating that "the defense [of statute of limitations] need not be articulated with any rigorous degree of specificity: 'The defense is sufficiently raised for purposes of Rule 8 by its bare assertion. Identification of the particular statute relied upon, though helpful, is not required in the pleading.' " (quoting *Santos v. District Council of New York City*, 619 F.2d at 967)).

Of course, this brings us back to the pleading/motion distinction again, since it is certainly not the same thing to plead something in general terms as it is to make that argument in a motion. But given the clear trend of cases not to hold a party strictly to all its waivers of affirmative defenses, even when those waivers are clearly waivers as defined by the Federal Rules (at least where there is no prejudice to the other side), and given the fact that in this instance nothing in the Rules would seem to indicate that there has actually been a waiver, the only possible reason we could see for not allowing the defendants to raise the

correct statute of limitations as a defense now would be if the plaintiffs would suffer some prejudice as a result.

Since "prejudice" does not mean simply "being more likely to lose," but rather "being deprived of a fair opportunity to present arguments against the newly raised defense," it is clear that the plaintiffs will not suffer any prejudice if the defendants are allowed to raise this defense now. *See Levald*, 998 F.2d at 687 (Where the defendant "pleaded the statute of limitations in its answer, and thus preserved the defense," and the plaintiff "had the opportunity to present argument on the statute of limitations question before the district court and on appeal," the court was not "troubled by the fact that [the defendant] had not raised the defense in the particular motion before the district court."). In arguing against the defendants' motion to dismiss the First Amended Complaints in 1992, most of the arguments the plaintiffs made against a finding that any of their claims were time-barred would have applied equally against any statute of limitations defense. Those arguments related to when their claims accrued, and whether the 1987 Plan merely "extended" the takings that had occurred under the 1984 Plan. If the plaintiffs had prevailed on these arguments, then it would not have mattered what statute of limitations was eventually found to apply.

As to the issue of what statute of limitations *should* apply, the plaintiffs had ample opportunity to argue in favor of various alternatives. In their 1993 Opening Brief to the Ninth Circuit, the plaintiffs argued that either a three-year or a five-year statute of limitations should be applied to their claims. Pls.' 1993 Opening Br. at 28-33. Of course, it did not seem to bother them then that even the

three-year statute *they* were advocating would have barred their 1987 Plan claims.[6] This was probably due to their firm but misguided belief that their 1987 Plan claims were not new claims, but merely "extensions" of their claims against the 1984 Plan, and, as such, immune from the effects of any statute of limitations. *See, e.g.*, Pls.' Resp. to Mot. NO. 3 at 23; Pls.' 1993 Opening Br. at 33-36. *In fact the plaintiffs actually point out explicitly that the statute of limitations for the § 1983 claims accruing after 1985 is one year in California and two years in Nevada.* Pls.' 1993 Opening Br. at 30 n. 27. Unsurprisingly, they did not go on to point out that the application of these limitations periods would bar their 1987 Plan claims. Since plaintiffs were thus the first side to argue that these are the correct statutes of limitations to apply to § 1983 claims accruing after 1985, it would seem odd to allow the plaintiffs to prevent the defendants from raising that same argument now.

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[6] As discussed in note 3, *supra*, the three-year statute of limitations probably was the applicable statute of limitations for § 1983 claims which accrued prior to 1985. Thus it actually does make some sense that the plaintiffs were arguing in favor of the three-year limit, since at the time, what was at stake was more than just their claims against the 1987 plan. Their claims against both Ordinance 81-5 and Resolution 83-21 had also been dismissed as time-barred by the sixty-day Compact statute of limitations; however, these claims, unlike their 1987 Plan claims, would not have been barred by the three-year statute, since the plaintiffs' original complaints were filed within three years of the earliest date on which these claims could have been seen as having accrued (i.e., Ordinance 81-5 went into effect on June 25, 1981, and the plaintiffs' original complaints were filed on June 25, 1984).

In any case, it certainly shows that the plaintiffs are not exactly being ambushed or taken unaware by this argument. In addition, the plaintiffs also had the opportunity to argue in their Opening Brief in favor of a statute of limitations which would have allowed their 1987 Plan claims to be brought at the times they filed their First Amended Complaints – that is, the five-year statute applicable to inverse condemnation claims in California (which the Ninth Circuit had even briefly considered as a viable option for takings claims – see discussion in note 3, *supra*). So the plaintiffs have essentially already advanced all the arguments they could hope to make against the contention that their 1987 Plan claims are time-barred by the correct § 1983 statute of limitations. Thus the plaintiffs will suffer no prejudice if the defendants are allowed to raise this defense at the present time. Therefore, we hold that the defendants have *not* waived their right to raise the correct statute of limitations for § 1983 claims as a defense to the plaintiffs' claims against the 1987 Plan, and that the plaintiffs' claims against the 1987 Plan are in fact barred by this statute of limitations.

IT IS, THEREFORE, HEREBY ORDERED that the motion (Doc. # 250, motion 3) for an order dismissing all the plaintiffs' claims against the 1987 Plan is hereby ***GRANTED***.

TAHOE-SIERRA PRESERVATION COUNCIL, INC.; Richard A. Allison; Alpine Investment Company, Ltd.; AMCO, Inc.; Jeffrey B. Andersen; Beth C. Andersen; Peter J. Andersen; Janet I. Andersen; Donald F. Archibald; Jean L. Atherton; David E. Baker; Maxine A. Baker; John H. Baker; Pierino C. Barengo, et al., Plaintiff-Appellee-Cross-Appellant,

v.

TAHOE REGIONAL PLANNING AGENCY, a separate legal entity created pursuant to an interstate compact between the States of California and Nevada; the voting members of the governing body of the Tahoe Regional Planning Agency including Tony Clark, Chester A. Gibbs, Alexander Haagen, III, Stan Hansen, Thomas Hsieh, James King, Robert Pruett, James S. Reed, Larry Sevinson, Thomas Stewart, William D. Swackhamer, Peggy Twedt, Ronald D. Westergard and Norman C. Woods; State of California; State of Nevada, Defendant-Appellant-Cross-Appellee.

Nos. 99-15641, 99-15771.

United States Court of Appeals,
Ninth Circuit

Filed Oct. 20, 2000

Before: POLITZ*, REINHARDT, and HAWKINS, Circuit Judges.

Prior Report: 216 F.3d 764

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* The Honorable Henry A. Politz, Senior United States Circuit Judge for the Fifth Circuit Court of Appeals, sitting by designation.

ORDER

Judges Politz, Reinhardt, and Hawkins voted to deny the petition for rehearing. Judges Reinhardt and Hawkins voted to deny the petition for rehearing en banc and Judge Politz recommended denial of the petition for rehearing en banc.

A judge of the court called for a vote on the petition for rehearing en banc. A vote was taken, and a majority of the active judges of the court failed to vote for en banc rehearing. Fed. R.App. P. 35(f).

The petition for rehearing and the petition for rehearing en banc are denied.

KOZINSKI, Circuit Judge, with whom Circuit Judges O'SCANNLAIN, TROTT, T.G. NELSON and KLEINFELD join, dissenting from the order denying the petition for rehearing en banc:

The panel does not like the Supreme Court's Takings Clause jurisprudence very much, so it reverses *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987), and adopts Justice Stevens's *First English* dissent. Because we are not free to rewrite Supreme Court precedent, I urged our court to take this case en banc. By voting not to rehear, we have neglected our duty and passed the burden of correcting our mistake on to a higher authority.

1. For almost twenty years, Lake Tahoe property owners have battled the Tahoe Regional Planning Agency (TRPA), which has blocked the owners' efforts to build homes on their land. The primary issue on this appeal,

the fourth in this interminable case, is a temporary moratorium that required owners to leave their land idle for almost three years. The moratorium is only one of a series of restrictions and regulations that have prevented the plaintiffs – largely families who purchased lots in the 1970s hoping to build vacation or retirement homes – from making any use whatsoever of their property. After a bench trial, the district court found that the regulation deprived the owners of the use of their property for three years, and so held they were entitled to compensation. The panel does not set aside the lower court's finding. Instead, it reverses the judgment because, in its view, a temporary regulation can *never* be a regulatory taking.

The government may conscript private property for public purposes, but the Fifth Amendment requires that it pay the owner for it. *See* U.S. Const. amend. V ("nor shall private property be taken for public use, without just compensation"). The requirement of just compensation ensures that the few are not forced to bear the cost of uses that benefit the many. Although a taking is most obvious where the government directly appropriates the property, physical occupation is not necessary. "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 67 L.Ed. 322 (1922). The Supreme Court has explained time and again that where a regulation deprives the owner of *all* use and enjoyment of his property, this amounts to a taking and the government must pay. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). That's because the "total deprivation of beneficial use is, from the landowner's

point of view, the equivalent of a physical appropriation." *Id.* at 1017, 112 S.Ct. 2886. This compensation requirement also guarantees that the government does not do by regulation what it cannot do through eminent domain – i.e., take private property without paying for it.

Of course, most land-use regulations are not takings and do not call for compensation. A regulation effects a taking only where it denies the owner "all economically beneficial or productive use of land." *Id.* at 1015, 112 S.Ct. 2886. *Lucas* held that a South Carolina agency took two beachfront lots when it promulgated an environmental regulation that prevented the owner from building on his property. The Court concluded that, when the property owner is required "to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Id.* at 1019, 112 S.Ct. 2886.

The only difference between this case and *Lucas* is that the regulation here had a finite duration. It was originally supposed to expire after two years and then was extended for another eight months. (In fact, its prohibitions continue to this day under subsequent development plans.) So the question is whether there is something special about a finite moratorium that relieves the government from its duty to compensate. The Supreme Court answered that question in *First English* when it said that " 'temporary' takings which, as here, deny a landowner all use of his property, are *not different in kind* from permanent takings, for which the Constitution clearly requires compensation." 482 U.S. at 318, 107 S.Ct. 2378 (emphasis added).

First English concerned a temporary development moratorium that Los Angeles enacted in response to a flood in the Angeles National Forest. First English Church challenged the ordinance, which prevented it from rebuilding damaged buildings. The California courts ruled that the regulation could only be a taking if permanent; if, on the other hand, the county decided to rescind the regulation, it ceased to be a taking. The U.S. Supreme Court disagreed, holding that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *Id.* at 321, 107 S.Ct. 2378.

Justice Stevens dissented from *First English* because he disagreed with the Court's "conclu[sion] that all ordinances which would constitute takings if allowed to remain in effect permanently, necessarily also constitute takings if they are in effect for only a limited period of time." *Id.* at 322, 107 S.Ct. 2378 (Stevens, J., dissenting). Justice Stevens would have held that a temporary regulation cannot be a taking, even though it deprives the owner of all present uses, because the property retains value based upon its future uses. That reasoning, embraced by no other member of the Supreme Court, is adopted by the panel in this case.

While the opinion nowhere cites Justice Stevens's *First English* dissent, the reasoning – and even the wording-bear an uncanny resemblance. Here's why Justice Stevens disagreed with *First English*:

Regulations are three dimensional; they have depth, width, and length. As for depth, regulations define the extent to which the owner may not use the property in question. With respect to width, regulations define the amount of property encompassed by the restrictions. Finally, and for purposes of this case, essentially, regulations set forth the duration of the restrictions. It is obvious that no one of these elements can be analyzed alone to evaluate the impact of a regulation, and hence to determine whether a taking has occurred. . . . [I]n assessing the economic effect of a regulation, one cannot conduct the inquiry without considering the duration of the restriction. . . . Why should there be a constitutional distinction between a permanent restriction that only reduces the economic value of the property by a fraction – perhaps one-third-and a restriction that merely postpones the development of a property for a fraction of its useful life – presumably far less than a third?

Id. at 330, 332, 107 S.Ct. 2378 (Stevens, J., dissenting). And here is the key passage of the panel's opinion:

> Property interests may have many different dimensions. For example, the dimensions of a property interest may include a physical dimension (which describes the size and shape of the property in question), a functional dimension (which describes the extent to which an owner may use or dispose of the property in question), and a temporal dimension (which describes the duration of the property interest). . . . A planning regulation that prevents the development of a parcel for a temporary period of time is conceptually no different than a land-use restriction that permanently denies all use on a discrete portion of property, or that permanently restricts a type of use across all of the parcel. Each of these three types of regulation will have an impact on the parcel's value. . . . There is no plausible basis on which to distinguish a similar diminution in value that results from a temporary suspension of development.

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 216 F.3d 764, 774, 776, 777 (9th Cir.2000) (citation omitted). Although claiming its opinion is fully consistent with *First English*, the panel plagiarizes Justice Stevens's dissent.

The panel opinion creates a conflict with *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796 (Fed.Cir.1993), which followed the majority's reasoning in *First English*. In so doing, *Tabb Lakes* recognized that "a taking, even for a day, without compensation is prohibited by the Constitution." *Id.* at 800. Under the panel's ruling in our case, a taking for a day could *never* require compensation, because despite the temporary deprivation, the property would retain almost all of its value based upon its expected future uses.

2. One problem with the panel's theory, and the theory of Justice Stevens's dissent, is that it views the regulation's effect on a property's value as the taking itself, rather than as a test for whether the government has deprived the owner of the benefits of his property. A regulation is a taking not because it destroys value, but because "total deprivation of beneficial use is, from the landowner's point of view, *the equivalent of a physical appropriation*." *Lucas*, 505 U.S. at 1017, 112 S.Ct. 2886 (emphasis added). In the case of regulations without a

sunset provision, the deprivations of value and use are one and the same because, where the government permanently prevents the owner from putting his property to any beneficial use, no potential buyer would offer a dime for it.[1]

But this identity between value and use obviously does not hold true in the case of a temporary taking. The government can deprive the owner of all present use, but the property *might* still retain value based upon its future uses. I emphasize "might," because so-called temporary moratoria have a habit of living beyond their purported termination dates. In this case, a series of consecutive development moratoria has prevented the landowners from building any homes on their lots for the two decades since the start of this litigation. If a local government can evade its constitutional obligations by describing a regulation as "temporary," we create a sizable

---

[1] In fact, there is no clear-cut distinction between a permanent prohibition and a temporary one. Governmental policy is inherently temporary while land is timeless. Even a permanent prohibition can be rescinded and, in the fullness of time, almost certainly will be. The land may retain market value based on speculation that it will someday become usable because the regulation will be revoked. *See, e.g., Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 902 (Fed.Cir.1986) (recognizing that land might have value under a permanent regulation because a buyer could "bet that the prohibition of rock mining, to protect the overlying wetlands, would some day be lifted"); *Florida Rock Indus., Inc. v. United States*, 8 Cl.Ct. 160, 166 n. 6 (1985) ("If passively holding land against the possibility that restrictions on its use will be lifted were deemed a productive economic use, property would never be rendered useless by regulation and there could be no such thing as a regulatory taking.").

loophole to the Takings Clause. Why would a government enact a permanent regulation – and risk incurring an obligation to compensate – when it can enact one moratorium after another, perhaps indefinitely? Under the theory adopted by the panel, it's hard to see when a property owner would ever state a takings claim against such a scheme.[2]

Consider also the effect of this theory on non-regulatory takings. Let's say the government decides to use your house as a warehouse for three years. You are locked out and the government has the run of the property for that period. Is there any doubt that you have suffered a taking for which you should be compensated? Of course not. Why should the case be any different if the government simply prohibits you from using your house for three years, but never does get around to using it as a warehouse?

Indeed, it's well-established that temporary physical takings require compensation. *See, e.g., Kimball Laundry Co. v. United States*, 338 U.S. 1, 69 S.Ct. 1434, 93 L.Ed. 1765 (1949); *United States v. Petty Motor Co.*, 327 U.S. 372, 66 S.Ct. 596, 90 L.Ed. 729 (1946); *United States v. General Motors Corp.*, 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945). The panel opinion dismisses these cases because

---

[2] Waiting to see whether a temporary regulation is extended indefinitely will, of course, raise very serious statute of limitations and laches problems. Indeed, in this very case, the panel holds that the statute of limitations bars the property owners' challenge to a regulation that succeeded the temporary moratorium (and continues to prevent them from building homes on their property). *See Tahoe-Sierra*, 216 F.3d at 789.

they involved physical takings, rather than regulatory ones. *See Tahoe-Sierra*, 216 F.3d at 779 ("The fact that just compensation was required in these cases, however, has no bearing on the question before us."). But *First English* rejected that distinction and found that these cases provided "substantial guidance" for its holding that all temporary takings, including regulatory ones, required compensation. 482 U.S. at 318, 107 S.Ct. 2378. Again, the panel substitutes its own view of takings law for that of the Supreme Court.

These are all big problems with the panel's theory. But, of course, the biggest problem is that *First English* rejected it. *First English* held that a taking occurs when the government deprives an owner of the use of his property, even temporarily. *See* 482 U.S. at 318, 107 S.Ct. 2378 (" '[T]emporary' takings which, as here, deny a landowner all *use* of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." (emphasis added)); *see also Lucas*, 505 U.S. at 1033, 112 S.Ct. 2886 (Kennedy, J., concurring) ("It is well established that temporary takings are as protected by the Constitution as are permanent ones."). Nothing in the opinion – or any other[3] –

[3] The panel cites a pre-*First English* decision, *Agins v. City of Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), as a case that applied the panel's rule against "conceptual severance in the temporal dimension." *Tahoe-Sierra*, 216 F.3d at 776. But that case is clearly distinguishable. In *Agins*, the owner sought compensation for a taking that never occurred. The city brought a condemnation proceeding against the owner but subsequently abandoned the suit. The Court rejected the owner's claim that the suit's temporary effect on the value of his property was an

suggests otherwise. By adopting Justice Stevens's dissent, the panel places itself in square conflict with the majority's opinion in *First English*.

Of course, the panel doesn't admit that its opinion aligns itself with Justice Stevens's dissent, so it must pretend *First English* said nothing relevant to this case. And so the panel does, claiming that *First English* does not address whether a temporary moratorium is a taking, because it was "not even a case about what constitutes a taking." *Tahoe-Sierra*, 216 F.3d at 777. It is true that *First English* did not have to determine whether there was a temporary taking, because it accepted the state court's conclusion that a regulation prohibiting all development was a taking while it was in effect. (The Supreme Court endorsed that result a few years later in *Lucas*.) But *First English* did decide that a temporary regulation is "not different in kind" from a permanent one: If either deprives the owner of all use of his property, then the owner is entitled to compensation for the taking. *First English*, 482 U.S. at 318, 107 S.Ct. 2378. The panel does not deny that the moratorium here, like the regulation in *Lucas*, deprived the owners of the use of their property for its duration. But it ignores *First English*'s requirement that the owners be compensated for a temporary taking.

The panel also takes shelter from *First English* in the Supreme Court's acknowledgment that it did " 'not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits,

action requiring compensation. *See Agins*, 447 U.S. at 263 n. 9, 100 S.Ct. 2138. That's quite different from a regulation that deprives an owner of all use of his property for a period of time.

changes in zoning ordinances, variances, and the like which are not before us.' " *Tahoe-Sierra*, 216 F.3d at 778 n. 17 (quoting *First English*, 482 U.S. at 321, 107 S.Ct. 2378). But that language in *First English* hardly authorizes the panel to ignore the decision altogether. Rather, it recognizes that a temporary taking only occurs when there is in fact a taking. Delays in obtaining a building permit, changes in zoning ordinances, or other temporary restrictions will not require compensation unless they deprive the landowner of all economically beneficial uses of the property for their duration. Here, the three-year prohibition on construction does not compare with the inherent delay in obtaining a permit or the frictional delay in the permitting process. The regulation clearly blocked all construction during the moratorium period.

Justice Holmes noted long ago that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal*, 260 U.S. at 416, 43 S.Ct. 158. *First English* recognized that the costs its decision imposed upon local regulators "necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them." *First English*, 482 U.S. at 321, 107 S.Ct. 2378. The panel's desire to ease local governance does not justify approving means that violate rights secured by the Fifth Amendment as authoritatively interpreted by the Supreme Court.

EXCERPTS FROM ORDINANCE NO. 81-5

Except as otherwise provided by this ordinance, no person shall perform any construction, work, use or activity, including without limitation, grading, clearing, removal of vegetation, filling or creation of land coverage, upon land within land capability districts 1a, 1c, 2 and 3 without first obtaining a permit from the Agency. The application for such a permit shall be reviewed and approved as a "project" pursuant to the Compact and the Rules and Regulations of Practice and Procedure of the Agency. . . .

* * *

Except as otherwise provided by this ordinance, and subject to the exceptions set forth in this subsection, no person shall perform any grading, clearing removal of vegetation, filling or creation of land coverage upon land within land capability districts 1a, 1c, 2 and 3.

* * *

Notwithstanding any other provision of this ordinance or of any other ordinance of the Agency, no person shall perform any grading, clearing, removal of vegetation, filling or creation of land coverage, within or upon a stream environment zone ("SEZ"), as described or depicted upon maps contained in the Plan.

* * *

Notwithstanding any other provision of this ordinance or of any other ordinance of the Agency, no person shall perform any construction, work, use or activity upon a lot or parcel containing an SEZ without first obtaining a permit from the Agency, the application for which permit shall be reviewed and approved as a "project". . . . Such

application shall not be approved unless it is found by the Agency that it proposes no grading, clearing, removal of vegetation, filling or creation of land coverage within the SEZ. . . .

TAHOE REGIONAL PLANNING AGENCY

RESOLUTION NO. 83-21

RESOLUTION SUSPENDING ISSUANCE OF PROJECT APPROVALS

BE IT RESOLVED BY the Governing Body of the Tahoe Regional Planning agency as follows:

1. All project reviews and approvals are suspended and no new applications will be accepted pending adoption of the new regional plan and implementing ordinances.

2. Applications currently on file with the Agency shall be the subject of consideration on a priority basis upon adoption of said plan and ordinances.

3. The terms of this resolution shall become effective on August 27, 1983 and shall expire ninety days thereafter.

4. There shall be no further business other than regional plan adoption, litigation and urgency business to be conducted at the September meeting of the Governing Body.

PASSED and ADOPTED by the Governing Body of the Tahoe Regional Planning Agency at its regular meeting on August 26, 1983, by the following vote:

Ayes: Mr. King, Mr. Stewart, Mr. Pruett, Mr. Gibbs, Mr. Swackhamer, Mr. Sevison, Mr. Robertson, Mr. Woods, Mr. Haagen, Mr. Westergard, Mr. Reed

Nays: None

Abstain: None

Absent: Mr. Hsiah, Mr. Hansen, Mr. Heikka

s/ Chairman James S. Reed

EXCERPTS FROM

1984

REGIONAL PLAN

FOR THE LAKE TAHOE BASIN

SOILS

The soil resource plays an important role related to all aspects of the physical and biological environment. Soil provides a growing medium to plants, which in turn helps bind and create new soils; the chain of events is complicated and extensive. The value of the soil resources in the Basin is measured by its ability to support vegetation and its contribution to the nutrient and sediment loads entering the streams and lakes. Two environmental thresholds are the basis for developing strategies for protection of the soil resource:

* * *

POLICIES

1. NO NEW RESIDENTIAL, TOURIST, PUBLIC SERVICE, RECREATION, OR COMMERCIAL DEVELOPMENT SHALL BE PERMITTED ON LAND CAPABILITY DISTRICTS 1-3 EXCEPT AS NOTED IN THE FOLLOWING POLICIES.

* * *

A. TRPA SHALL ESTABLISH A SINGLE FAMILY RESIDENCE EVALUATION SYSTEM, OR POINT PRIORITY SYSTEM, ON OR BEFORE JANUARY 1, 1985 (GOAL #1, POLICY #2, DEVELOPMENT AND IMPLEMENTATION SUBELEMENT).

* * *

B. PUBLIC OUTDOOR RECREATION FACILITIES ARE PERMISSIBLE USES IN LAND CAPABILITY DISTRICTS 1-3 IF:. . . .

* * *

C. PUBLIC WORKS PROJECTS ARE PERMISSIBLE USES IN LAND CAPABILITY DISTRICTS 1-3 IF:. . . .

* * *

Development within land capability district 1-3 is not consistent with the goals to manage high hazard lands for their natural qualities and shall generally be prohibited except under extraordinary circumstances involving public works. Each circumstance shall be evaluated based on the 4-prong test of this policy.

* * *

8. ALL EXISTING NATURAL FUNCTIONING SEZ'S SHALL BE RETAINED AS SUCH AND DISTURBED SEZ'S SHALL BE RESTORED WHENEVER POSSIBLE.

Steam environment zones (SEZ) shall be managed to perpetuate their various functional roles, especially pertaining to water cleansing and nutrient trapment. This requires enforcement of a non-degradation philosophy. This policy is common to the Water quality, Vegetation, Stream Environment Zone, and Wildlife Subselements and will be implemented through the Land Use Element and capital improvements program.

* * *

STREAM ENVIRONMENT ZONE

Stream environment and related hydrologic zones (SEZ) consist of the natural marsh and meadowlands, watercourses and drainageways, and floodplains which provide surface water conveyance from upland areas into Lake Tahoe and its tributaries. The boundaries of a stream environment zone can be delineated by the presence of riparian vegetation, alluvial soil, minimum buffer strips, and/or water influence areas.

* * *

POLICIES

1. RESTORE ALL DISTURBED STREAM ENVIRONMENT ZONE LANDS IN UNDEVELOPED, UNSUBDIVIDED LANDS, AND RESTORE 25% OF THE SEZ LANDS THAT HAVE BEEN DISTURBED, DEVELOPED, OR SUBDIVIDED.

* * *

2. SEZ LANDS SHALL BE PROTECTED AND MANAGED FOR THEIR NATURAL VALUES.

* * *

Supreme Court, U.S.
FILED
MAR 20 2001
CLERK

No. 00-1167

IN THE

Supreme Court of the United States

TAHOE SIERRA PRESERVATION COUNCIL, INC., *et al.*,

Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

E. CLEMENT SHUTE, JR.
Counsel of Record
FRAN M. LAYTON
ELLISON FOLK
SHUTE, MIHALY
& WEINBERGER LLP
Attorneys for Respondents
396 Hayes Street
San Francisco, CA 94102
(415) 552-7272

(Additional Counsel for Respondents listed on inside cover)

165991

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

JOHN L. MARSHALL
TAHOE REGIONAL
PLANNING AGENCY
P.O. Box 1038
Zephyr Cove, NV 89448
(775) 588-4547

BILL LOCKYER
Attorney General of the
State of California
RICHARD M. FRANK
Chief Assistant
Attorney General
MATTHEW RODRIQUEZ
Senior Assistant
Attorney General
DANIEL L. SIEGEL
Supervising Deputy
Attorney General
MARY J. SCOONOVER
Deputy Attorney General
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
(916) 445-9555

FRANKIE SUE DEL PAPA
Attorney General
of the State of Nevada
WILLIAM J. FREY
Deputy Attorney General
100 North Carson Street
Carson City, NV 89701
(775) 687-6532

QUESTIONS PRESENTED

1. Whether the court of appeals properly determined that the Tahoe Regional Planning Agency's temporary restriction on development does not constitute a categorical taking of property where the restriction did not deprive petitioners' property of either all use or all value and where the restriction was a reasonable, necessary, and short-term development moratorium while the Agency complied with its obligation to adopt a regional plan for the protection of Lake Tahoe.

2. Absent any showing of clear error, whether the court of appeals properly refused to overturn the district court's finding of fact that the Tahoe Regional Planning Agency's 1984 Regional Plan was not the cause of any harm to petitioners?

3. Whether the court of appeals properly determined that the Tahoe Regional Planning Agency had not waived its statute of limitations defense to petitioners' challenge to the Agency's 1987 Regional Plan?

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Respondents Tahoe Regional Planning Agency ("TRPA" or "the Agency"),[1] the State of California, and the State of Nevada respectfully request that this Court deny the petition for writ of certiorari seeking review of the decision of the United States Court of Appeals for the Ninth Circuit in this case.

STATEMENT OF THE CASE

The petition does not present the case that was tried before the district court or heard by the court of appeals. Petitioners rely heavily on unsupported factual assertions regarding the individual petitioners in this action and TRPA's so-called "20 year rolling moratorium" on development in the Tahoe Basin. No such facts were ever introduced at trial. Indeed, the parties specifically stipulated, and the district court ordered, that evidence regarding individual petitioners would not be presented at trial. The district court enforced this stipulation against both petitioners and TRPA. Likewise, because petitioners' challenge to TRPA's 1987 Regional Plan (or "1987 Plan") was filed well after the statute of limitations had run, the district court barred both petitioners and TRPA from introducing any evidence concerning events that occurred after 1987. In presenting a case based largely on unsupported factual allegations, the petition seriously mischaracterizes both the record below and the court of appeals' ruling. The petition accordingly seeks review of questions that are not presented either by the factual record or the lower courts' rulings in this case.

---

1. Petitioners' List of Parties incorrectly identifies the members of TRPA's governing body. The correct members are: Dean A. Heller, Dave Solaro, Hal Cole, Drake DeLanoy, Jim Galloway, Leslie Medina, Don Miner, Joanne K. Neft, Wayne Perock, Jon Plank, Brian Sandoval, Larry Sevison, Jerome Waldie, and Peter Chase Neumann.

BACKGROUND

A. Regulatory History.

In 1969, Congress approved the first Tahoe Regional Planning Compact, which created TRPA to address the unique planning and regulatory challenges facing the Tahoe region. Pub. L. No. 91-148, 83 Stat. 360. In particular, Lake Tahoe, an exceptionally pure and clear alpine lake in the northern Sierra Nevada Mountains and one of the most unique natural resources in the nation, is threatened by erosion and sediment caused by development. Petition Appendix ("Pet. App.") at 59-62.

Pursuant to the 1969 Compact, TRPA classified lands in the Lake Tahoe Basin according to their physical characteristics and soil type. Under this system, TRPA designated those lands which pose the highest risk of erosion and sediment runoff into the Lake as "High Hazard" lands. Pet. App. at 66-67. Wetlands and other areas near streams that are characterized by periodic flooding, high water tables, poor natural drainage, and riparian vegetation, were specifically designated as stream environment zone ("SEZ") lands. *Id.* at 64, 67. These land capability classifications and associated limits on development were incorporated into Land Use Ordinance No. 4, adopted by the Agency in 1972. *Id.* at 66.

Despite efforts to control pollution of the Lake under the 1969 Compact, numerous regulatory exceptions allowed excessive development on High Hazard and SEZ lands, with a corresponding deterioration of the Lake's water quality. *Id.* at 67. In an effort to slow this trend, the states and Congress amended the Compact in 1980. *Id.* at 68; *see* Pub. L. No. 96-551, 94 Stat. 3233; Cal. Gov't Code § 66801; N.R.S. § 277.200. The 1980 Compact required TRPA to develop a regulatory program that was to be completed in two phases. First, within 18 months, TRPA was required to establish "environmental threshold carrying capacities" for the region. Pet. App. at 68. Within one year of establishing the environmental thresholds, TRPA was required to adopt a regional plan that would implement and achieve the thresholds. *Id.* at 68. The development of environmental thresholds and a plan that would achieve those thresholds required resolution of exceedingly complex scientific and planning issues, and presented a regulatory challenge that was unprecedented at that time. *Id.* at 74; *California ex rel. Van de Kamp v. Tahoe Regional Planning Agency*, 766 F.2d 1308, 1311 (9th Cir. 1985).

Pending completion of its responsibilities under the 1980 Compact, TRPA enacted Ordinance 81-5 which, with exceptions for the construction of some single family homes, temporarily restricted development on High Hazard and SEZ lands. Pet. App. at 7, 70-74. Ordinance 81-5 expired "upon the adoption by the agency of Amendments to the Regional Plan." *Id.* at 7. The Agency adopted the environmental threshold carrying capacities on August 26, 1982. However, it became clear that the complexity of the planning process would prevent the Agency from meeting the Compact's one-year deadline for completion of the regional plan following adoption of the thresholds. Thus, on August 26, 1983, TRPA adopted Resolution 83-21, which temporarily suspended review of development applications "pending adoption of the new regional plan." *Id.* at 8, 74-75.

Eight months later, on April 26, 1984, TRPA adopted its new regional plan. On the following day, however, the

United States District Court for the Eastern District of California issued a temporary restraining order, later followed by a preliminary injunction, prohibiting TRPA from taking any action to approve building projects. *Id.* at 8-9, 76-77. The court of appeals upheld the preliminary injunction in *California v. TRPA*, 766 F.2d. 1308.

B. Actions Challenged by Petitioners.

Petitioners raise a facial takings challenge to four temporally and substantively distinct regulatory measures adopted by TRPA pursuant to its legal obligations under the 1980 Compact. The parties and the courts have consistently separated these challenges into four separate time periods:

Period I (August 24, 1981 - August 26, 1983) covers the effective duration of TRPA Ordinance 81-5, which placed temporary restrictions on development of High Hazard and SEZ lands pending TRPA's adoption of environmental threshold carrying capacities and the regional plan required by the Tahoe Regional Planning Compact of 1980.

Period II (August 27, 1983 - April 25, 1984) covers the effective duration of Resolution 83-21, which temporarily suspended review and approval of projects until TRPA adopted its new regional plan on April 25, 1984.

Period III (April 26, 1984 - July 1, 1987) covers the time period during which the United States District Court for the Eastern District of California enjoined implementation of the 1984 Regional Plan (or "1984 Plan") that TRPA adopted pursuant to the 1980 Compact.

Period IV covers the time period after TRPA adopted an entirely new regional plan on July 2, 1987.

The petition confuses the significant differences between these four separate regulatory measures by mischaracterizing them as a "series of rolling moratoria/ prohibitions" that constitute a continual prohibition on the use of petitioners' properties. Petition for Certiorari ("Pet.") at 6. Because of both the difference in timing and the significant substantive differences in the four regulatory measures, the lower courts and the parties throughout this litigation have carefully distinguished the four relevant time periods. Pet. App. at 9-10, 78; *see also* Plaintiffs' Trial Brief at 2-3 (addressing each time period separately).

Specifically, the district court's findings confirm that Ordinance 81-5 (Period I) and Resolution 83-21 (Period II) imposed reasonable, temporary restrictions on development pending adoption of the 1984 Regional Plan. Pet. App. at 70-75. Petitioners did not challenge these factual determinations in the court of appeals. The district court findings further underscore the substantive differences between the restrictions on development imposed by each of the Period I and Period II restrictions and those imposed during Periods III and IV. For instance, had development not been enjoined by the district court, the 1984 Plan would have permitted development on some High Hazard and SEZs lands. The restrictions imposed by the 1987 Regional Plan are based on entirely new criteria for assessing an individual parcel's suitability for development. *Id.* at 70-78, 106; *see Suitum v. Tahoe Reg'l. Planning Agency*, 520 U.S. 725, 729-730 (1997).

C. The Rulings Below.

The district court rejected petitioners' takings claim in part and upheld it in part. Pet. App. at 57-127. The court rejected petitioners' claim with regard to Period III (the 1984

Regional Plan), because the 1984 Plan had been enjoined by the United States District Court for the Eastern District of California. "The reason a permit could not be obtained was the T.R.O. and the Preliminary Injunction, not the 1984 Plan." *Id.* at 106. The district court also rejected, in an earlier order, petitioners' takings claim with regard to Period IV (the 1987 Regional Plan), on the ground that the claim was barred by the applicable statute of limitations. *Id.* at 128-155.

The district court further found that petitioners "did not have reasonable, investment-backed expectations that they would be able to build single-family homes on their land within the six-year period involved in this lawsuit" and had failed to introduce any "evidence . . . regarding the specific diminution in value of any of [their] individual properties." *Id.* at 89, 90. Instead, the court found that "none of the land is completely 'valueless'. . . ." *Id.* at 94. Based on these findings the court determined that application of the factors set forth in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), "clearly leads to the conclusion that there was no taking." Pet. App. at 88. Notwithstanding this determination, the trial court concluded that the temporary moratorium in effect during Period I (Ordinance 81-5) and Period II (Resolution 83-21) had effected a categorical taking under *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992). Pet. App. at 96-101.

The court of appeals reversed in part and affirmed in part. *Id.* at 1-56. The unanimous panel reversed the district court's rulings that TRPA had taken petitioners' property during Periods I and II. It upheld the trial court's finding that TRPA had not caused a taking during Period III. The court of appeals also agreed with the district court that

the "law of the case" did not preclude TRPA from raising a statute of limitations defense to petitioners' challenge to the 1987 Plan (Period IV), which was filed four years after the Plan was adopted. *Id.* at 47-56.[2] The court of appeals subsequently denied petitioners' request for a rehearing *en banc*. *Id.* at 156.

REASONS FOR DENYING THE WRIT

None of the sweeping questions of law set forth by the petition is, in fact, presented by the record and rulings of the lower courts in this case. The court of appeals did *not* rule "that a temporary moratorium can *never* require constitutional compensation." Pet. at i (emphasis in original). The court did *not* rule that a land use regulatory agency can "escape its constitutional duty to pay for land . . . by the expedient of enacting a series of rolling, back-to-back 'temporary' moratoria/prohibitions extending over a period of 20 years." *Id.* Nor did the court of appeals hold that TRPA can "compel[] a selected group of individual landowners to forego *all* use of their individual homesites, and thereby compel a *de facto* donation of their land for public use without compensation." *Id.* (emphasis in original).

---

2. The court of appeals did not address several of TRPA's defenses which provide an alternative basis upon which to uphold the ruling in favor of TRPA: TRPA's actions could not have resulted in a taking under the nuisance exception to the takings doctrine; petitioners' claims are barred by the 60 day statute of limitations under the 1980 Compact; and petitioners could not demonstrate that TRPA took their properties because the agency permitted challenges to land capability designations which could have exempted petitioners' properties from the scope of TRPA's regulations.

The court of appeals instead expressly acknowledged that some temporary moratoria may rise to the level of a regulatory taking requiring just compensation, and simply held that petitioners' facial challenge fell short of that standard. The factual findings of the district court, upheld by the court of appeals, also wholly contradict petitioners' overbroad characterizations of TRPA's regulatory measures. Indeed, no facts concerning TRPA's actions after 1987 are in the record because the district court ruled that petitioners' Period IV (1987-present) takings claim is barred by the applicable statute of limitations.

This case, accordingly, presents only the three narrow issues described at the outset of this brief. *See* page i, *supra*. Because moreover, the court of appeals correctly decided each of these issues and none of those rulings conflicts with any decision of this Court or of any other court of appeals, no further review is warranted.

A. The Petition Does Not Present Any Important Legal Issue Meriting Supreme Court Review of the Court of Appeals' Determination That TRPA's Two Year, Eight Month Moratorium Did Not Result in a Categorical Taking Under *Lucas*.

Contrary to the first question presented by the petition (Pet. at i), the court of appeals did *not* hold that a temporary development moratorium "can never" result in an unconstitutional taking of property. The appellate court not only expressly denied any such intent,[3] but repeatedly

3. Indeed, the court of appeals specifically found that an unreasonably long moratorium could result in a taking. *See* Pet. App. at 38.

stressed the exceedingly circumscribed scope of its ruling "[i]n view of the limited nature of the plaintiffs' arguments on appeal." Pet. App. at 19. The court noted at the outset that petitioners "do not argue that the regulations constitute a taking under the ad hoc balancing approach described in *Penn Central*" and that "[o]ur focus is also narrowed by the fact that the [petitioners] bring only a facial challenge to Ordinance 81-5 and Resolution 83-21." Pet. App. at 19.

The only issue before the appellate court, therefore, was the narrow question whether the two year, eight month moratorium on development resulting from two temporary TRPA land use regulations amounted to "one of the 'relatively rare situations' where 'regulation denies all economically beneficial or productive use of land.' " *Id.*, quoting *Lucas*, 505 U.S. at 1016, 1018. Addressing that issue, the court reviewed the evidence and concluded that "the temporary moratorium imposed by these regulations did not deprive the [petitioners'] land in the Lake Tahoe Basin of either all of its 'value' or all of its 'use.' " *Id.* at 36.[4]

4. The district court's factual findings, not disturbed by the court of appeals (Pet. App. 40 n.30), underscore petitioners' failure to meet their burden. The district court found that because property owners in the Tahoe Basin held their property for an average of 25 years prior to development, petitioners "did not have reasonable investment-backed expectations that they would be able to build single-family homes on their land within the six-year period involved in this lawsuit." Pet. App. at 89. The district court further found that petitioners had made a "calculated choice" not to introduce any evidence "regarding the specific diminution in value of any of the [petitioners'] individual properties." *Id.* at 90. Petitioners did not appeal either of these factual findings by the district court.

1. There is No Conflict in The Law Regarding The Court of Appeals' Determination.

The court of appeals' ruling is consistent with every court decision that has addressed the constitutionality of reasonable development moratoria, and it does not conflict with either *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), or *Lucas*, 505 U.S. 1003. No court has ever determined that a temporary moratorium on development will *always* result in a taking. Instead, every court, like the court of appeals in this case, has consistently adopted a middle ground when evaluating temporary development moratoria.

In *Agins v. Town of Tiburon*, 447 U.S. 255 (1980), this Court applied well-established precedent to determine that,

> [m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are "incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense."

Agins, 447 U.S. at 263 n.9 (quoting *Danforth v. United States*, 308 U.S. 271, 285 (1939)).

The *Agins* plaintiffs argued that their alleged inability to use or sell their property during the pendency of the city's unsuccessful condemnation proceedings constituted a regulatory taking. 447 U.S. at 263 n.9. In rejecting this argument, this Court relied on the fact that the restriction on

the property's use caused by the city's "good faith planning activities" was temporary in nature:

> Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended.

Id. Similarly, where, as the district court determined, TRPA acted reasonably in adopting a moratorium, fluctuations in the value of petitioners' properties during the pendency of this moratorium do not provide the basis for finding a taking.

Nothing this Court said seven years later in *First English* alters the holding in *Agins*. *First English* was concerned not with what constitutes a taking, but with the "remedial question" of whether, *once a taking is established*, compensation can be avoided by the government's "[i]nvalidation of the ordinance . . . [and] converting the taking into a 'temporary' one." *First English*, 482 U.S. at 311, 319. Leaving no question as to the scope of its holding, this Court stated "[w]e merely hold that where the government's activities *have already worked a taking of all use of property*, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *First English*, 482 U.S. at 321 (emphasis added).[5] The Court, accordingly,

5. On remand the California court of appeal determined that the regulation at issue had not effected a taking of plaintiffs' property because the regulation was a temporary moratorium that was reasonable in its purpose, scope, and duration. *First English Evangelical Lutheran Church v. County of Los Angeles*, 258 Cal. (Cont'd)

expressly stated that it had "no occasion to decide whether the ordinance at issue actually denied appellant all use of its property." *Id.* at 313.

None of the cases that petitioners cite in support of their claim that the court of appeals' decision creates a conflict in the case law holds that a reasonable, temporary moratorium on development constitutes a taking of property. A review of the decision in *Tabb Lakes Ltd. v. United States*, 10 F.3d 796, 800 (Fed. Cir. 1993), for example, demonstrates how far petitioners must stretch to create an issue for this Court to review. Petitioners seize on the statement in *Tabb Lakes*, that "a taking, even for a day, without compensation is prohibited by the Constitution." *Id.* at 800. Petitioners, however, omit the court's next sentence: "However, the question here is, 'Was there a taking?' " Finding that " 'depreciation in value of the property by reason of preliminary activity is not chargeable to the government,' " the Federal Circuit determined that the Army Corps of Engineers had not caused a taking for the three year and two month period during which the Corps prevented plaintiffs from developing their property due to the Corps' improper assertion of regulatory jurisdiction. *Id.* at 801,

(Cont'd)

Rptr. 893, 906 (Cal. Ct. App. 1989). This Court declined to review the decision of the California court. 493 U.S. 1056 (1990). The relatively few other cases to address temporary planning moratoria since this Court's decision in *First English* are in accord. *See Zilber v. Town of Moraga*, 692 F. Supp. 1195, 1202-05 (N.D. Cal. 1988); *Santa Fe Village Venture v. City of Albuquerque*, 914 F. Supp. 478, 483 (D.N.M. 1995); *Williams v. City of Central*, 907 P.2d 701, 705 (Colo. Ct. App. 1995); *Woodbury Place Partners v. City of Woodbury*, 492 N.W.2d 258, 263 (Minn. Ct. App. 1992); *Tocco v. New Jersey Council on Affordable Housing*, 576 A.2d 328, 330 (N.J. Super. Ct. App. Div. 1990), *cert. denied* 499 U.S. 937 (1991).

citing *First English*, 482 U.S. at 320.[6] The other cases cited in the petition do not involve development moratoria at all and merely reiterate the holding of *First English*: once a taking has been established, the regulating agency must pay compensation for the time period during which the taking was in effect.[7]

2. The Court of Appeals' Ruling is Correct.

The court of appeals' decision falls well within the scope of the relevant case law. The extensive facts proved at trial established the reasonableness of TRPA's two year, eight month moratorium under the circumstances of this case. Pet. App. at 59-82. The trial court described the extent of the serious threat presented to Lake Tahoe and concluded

6. Like the petition, the dissent to the court of appeals' denial of rehearing *en banc* relies on this same statement in *Tabb Lakes* and, as a result, mischaracterizes both that case, the effect of the court of appeals' decision here, and this Court's decision in *First English*. *See* Pet. App. at 162.

7. *Cumberland Farms v. Town of Groton*, 719 A.2d 465, 474-75 (Conn. 1998) (acknowledging that preliminary regulatory activities do not constitute a taking, but once a taking is found compensation must be paid); *Eberle v. Dane County Board of Adjustment*, 595 N.W.2d 730, 742 (Wis. 1999) (once a taking found, compensation is due); *Whitehead Oil Co. v. City of Lincoln*, 515 N.W.2d 401, 408 (Neb. 1994) (reiterating the test for a taking of property); *Sintra v. City of Seattle*, 829 P.2d 765, 774 (Wash. 1992) (remanding for determination whether taking occurred and finding that compensation required if temporary taking found); *The 614 Company v. Minneapolis Community Development Agency*, 547 N.W.2d 400, 409 (Minn. 1996) (finding that appellants stated cause of action for a taking, but indicating "ample doubts about appellants' ability to prove its cause of action.").

that TRPA's decision to impose the moratorium was "a direct and reasonable way to combat the problem. Faced with the responsibility for solving a serious problem, TRPA took the necessary steps to do so." *Id.* at 91. The trial court expressly rejected the notion that TRPA was unreasonable in enacting a temporary moratorium on building in High Hazard and SEZ lands, or that TRPA wasted time in the planning process and "should have reached agreement on a regional plan sooner than it did." *Id.* at 115. Based on these clear findings, there is nothing remarkable about the appellate court's conclusion that the temporary moratorium did not constitute a *Lucas* categorical taking.

B. The Court of Appeals Properly Upheld the District Court's Factual Finding, Following Trial, That TRPA's 1984 Regional Plan Was Not the Cause of Petitioners' Harm.

Petitioners also seek review of the court of appeals' decision upholding the district court's finding that TRPA's 1984 Plan was not the cause of petitioners' alleged injuries during Period III. In doing so, they do not explain why the district court's fact-bound finding on causation — which, as noted in the court of appeals' opinion, is reviewed under the "clearly erroneous" standard, and which is an issue that almost never arises in the regulatory takings context — is sufficiently important for review by this Court. Further, petitioners do not point to any conflict between the court of appeals' fact-bound decision and the decisions of other United States courts of appeals or state courts of last resort. In short, no reason whatsoever is presented as to why this Court should review a district court finding of fact.

The district court concluded, after hearing substantial testimony, that the 1984 Plan did not cause petitioners' alleged injuries. Contrary to the representations in the petition, neither the district court nor the court of appeals suggested that an "injunction issued in a different case barr[ing] permits to other landowners" is enough to insulate a regulatory authority from regulatory takings liability. *See* Pet. at i. The district court found after trial that the legal effect of the injunction was far broader. Specifically, the district court found that: a court injunction prevented the 1984 Plan from ever taking effect; the injunction "nullified" the Plan's "escape mechanisms" which could have permitted development on petitioners' lots; the Plan was never applied to petitioners; the injunction was not foreseeable (a finding which alone defeats causation under the "settled tort precepts" to which petitioners point — *see* Pet. at 29); and TRPA "vigorously" fought the injunction. *See* Pet. App. at 105-108. The court of appeals appropriately upheld the factual findings of the district court.

This Court has recently explained that causation determinations "involve application of law to fact, which is left to the factfinder, subject to limited review." *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 840-41 (1996). Petitioners in this case have failed to identify any "very obvious and exceptional showing of error" in the district court's determinations which would warrant review by this Court. *Id.* at 841 (quoting *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949)).

C. Having Conceded That Their Challenge to the 1987 Plan Is Barred by the Statute of Limitations, Petitioners Fail to Raise Any Grounds for this Court to Review Their Stale Claim.

The focus of petitioners' second and third questions presented is exceedingly unclear, but together they appear to raise a takings claim against TRPA's 1987 Regional Plan. The district court, however, found that petitioners failed to initiate a judicial challenge to the new plan until years after the statute of limitations had run, and that the challenge was therefore time-barred. Pet. App. at 155. Petitioners did not contest that ruling on appeal, but argued that under the law of the case, the court of appeals had already determined that TRPA had waived its statute of limitations defense. *Id.* at 47-56. The appellate court, however, agreed with the trial judge that an earlier holding of the court of appeals was not controlling because it was based on "clear factual error" and its "legal holding . . . is clearly wrong." *Id.* at 54. Since petitioners' argument on appeal was confined to "law of the case" and petitioners "offer[ed] no argument on the merits of the timeliness of their Period IV claims," the court of appeals correctly affirmed the district court's dismissal of those claims. *Id.* at 56.

Petitioners cannot now circumvent that dispositive ruling by casting for the first time all of TRPA's regulatory actions as one single takings claim stretching up to the present day. *See* Pet. at 26-29. Petitioners' characterization of TRPA's actions is contrary to the approach followed by both the courts and the parties, including petitioners, throughout this litigation. *See* ¶ 4-5, *supra*. It also lacks any possible legal merit. The cases upon which petitioners rely establish merely that a *timely* takings claim may include prior acts that were

part of an ongoing series of unlawful actions that deprived landowners of their property. *See* Pet. at 26-28. They provide no support for petitioners' belated and quite different suggestion that an otherwise *untimely* takings claim can somehow be made part of a timely claim. As found by the lower court, petitioners' regulatory takings challenge to the 1987 Plan was untimely and cannot now be revived.[8]

CONCLUSION

Respondents respectfully request that the petition be denied.

Respectfully submitted,

E. CLEMENT SHUTE, JR.
Counsel of Record
FRAN M. LAYTON
ELLISON FOLK
SHUTE, MIHALY
& WEINBERGER LLP
396 Hayes Street
San Francisco, CA 94102
(415) 552-7272

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8. Respondents respectfully suggest that the petition in this case need not be held pending this Court's resolution of *Palazzolo v. Rhode Island*, No. 99-2047, currently before the Court. This facial regulatory taking case raises none of the as-applied regulatory takings issues before the Court in *Palazzolo*. Neither ripeness nor the economic viability issue raised in that case is closely related to the rulings of the courts below in this case. Finally, *Palazzolo* does not, like this case, concern a *Lucas* challenge to a temporary moratorium on development.

JOHN L. MARSHALL
TAHOE REGIONAL
PLANNING AGENCY
P.O. Box 1038
Zephyr Cove, NV 89448
(775) 588-4547

BILL LOCKYER
Attorney General of the
State of California
RICHARD M. FRANK
Chief Assistant
Attorney General
MATTHEW RODRIQUEZ
Senior Assistant
Attorney General
DANIEL L. SIEGEL
Supervising Deputy
Attorney General
MARY J. SCOONOVER
Deputy Attorney General
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
(916) 445-9555

FRANKIE SUE DEL PAPA
Attorney General
of the State of Nevada
WILLIAM J. FREY
Deputy Attorney General
100 North Carson Street
Carson City, NV 89701
(775) 687-6532

Attorneys for Respondents

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No. 00-1167

In The

Supreme Court of the United States

TAHOE SIERRA PRESERVATION COUNCIL, INC., a California non-profit corporation and membership organization, *et al.*,

Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY, a separate legal entity created pursuant to Bi-State Compact, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

LAWRENCE L. HOFFMAN
HOFFMAN LAW OFFICES
3000 No. Lake Boulevard
Post Office Box 7740
Tahoe City, CA 96145
(530) 583-8542

MICHAEL M. BERGER*
GIDEON KANNER
BERGER & NORTON
A LAW CORPORATION
1620 26th Street
Suite 200 South
Santa Monica, CA
90404-4040
(310) 449-1000

**Counsel of Record*
Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION

One might think that the Tahoe Regional Planning Agency (TRPA) would be proud of its work. Its mission was to maintain the clarity of Lake Tahoe by restricting development of the surrounding land. The Petitioners at bench are testimonials to the success of TRPA's efforts. For more than two decades, TRPA's policies have prevented any development of the hundreds of subdivided residential lots they owned.

And yet, rather than proclaiming its success from the proverbial rooftops, TRPA denies that it has done any such thing. According to TRPA it merely enacted a modest, short-term moratorium while it drafted its plan. Nothing more. And that, goes the argument, caused only a minor disruption in the ability of the Petitioners to use their land. This is simply not so, as the Court can readily determine from its own decision in *Suitum v. Tahoe Reg. Plan. Agency*, 520 U.S. 725 (1997) – which dealt with one such lot. In fact, TRPA has been phenomenally successful in stifling development. These individuals have been forced to subsidize the rest of us by TRPA's forced grant of a clear zone around the lake in order to preserve its beauty for the ages. Their property has been taken and they are entitled to compensation.

TRPA's brief seeks to demonstrate two things: First, that it didn't really do much; and second, that what it did was reasonable. Neither is a defense. The first is belied by the record (nothing has been built on the subject land for the two decades since TRPA enacted its first "temporary" moratorium). The second is wrong as a matter of law. The facts will be discussed presently. For now, suffice it to

note that neither the reasonableness nor the propriety of TRPA's actions is relevant. The fact that a regulation may be reasonable and proper doesn't eliminate the Constitutional need to compensate when the regulation deprives the owners of regulated land of *all* economically productive use. Litigation under the Just Compensation Clause *presumes* that the regulator is acting within its powers. Otherwise, such actions would be *ultra vires* and void. Rather, the 5th Amendment:

> "is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of *otherwise proper interference amounting to a taking.*" (*First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 [1987]; emphasis added.)

At bottom, the continuing vitality of this Court's *First English* opinion hangs in the balance. As the five Judges who dissented from the 9th Circuit's views aptly put it:

> "*First English* recognized that the costs its decision imposed upon local regulators 'necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them.' " (App. 167; citation omitted.)

> "The panel does not like the Supreme Court's Takings Clause jurisprudence very much, so it reverses *First English*. . . . [W]e are not free to rewrite Supreme Court precedent. . . . " (App. 157.)

Without a grant of certiorari, this Court's regulatory taking precedents will have been rewritten, if not abrogated, for a large swath of the western United States.

I

TRPA'S BRIEF IS REMOVED FROM REALITY

TRPA's summary of what the 9th Circuit did – and did not – do is breathtaking for its refusal to deal with what actually happened during the last 20 years, and for its denial that the 9th Circuit actually did what TRPA asked:

First, TRPA asserts: "The court of appeals did *not* rule 'that a temporary moratorium can *never* require constitutional compensation.' " (Br. In Opp., p. 7; emphasis original.)

In fact, that is *precisely* what the 9th Circuit ruled. It did so by contrasting a temporary taking with a full fee taking and concluding that it is only the latter that constitutionally requires compensation. The reason offered for that was that the life of the land is infinite, and a temporary moratorium will eventually expire and permit use. Because of that, reasoned the 9th Circuit, the temporary moratorium cannot be considered a taking legally, any more than economically. (App., p. 38, fn. 26.)[1] The problem with that approach is that while the life of the land

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[1] TRPA says that the opinion below says expressly that some moratoria might be takings, thus belying the property owners' charge. (Br. In Opp., p. 8.) We prefer to let the opinion speak for itself:

> "Of course, were a temporary moratorium designed to be in force so long as to eliminate all present value

may be infinite, human lives are not. And, as Justice Holmes put it, the Constitution deals with persons, not with tracts of land. (*Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 [1910].) Thus, to tell mortal people that in the sweet bye and bye they, or perhaps their descendants, *might* be able to use their land is to take it from them.

Of course, the point of the 5th Amendment, like the rest of the Bill of Rights' protections, is to safeguard individuals from governmental overreaching. Here, those individuals own property. It is their individual interests that are at stake, and those are entitled to constitutional protection. Except in the 9th Circuit.

Second, TRPA asserts: "The court did *not* rule that a land use regulatory agency can 'escape its consfitutional duty to pay for land . . . by the expedient of enacting a series of rolling, back-to-back 'temporary' moratoria/prohibitions extending over a period of 20 years.' " (Br. In Opp., p. 7; emphasis original.)

In fact, however, that is *precisely* what the 9th Circuit did. By refusing to examine the totality of TRPA's 20 years of regulating this land and, instead, examining each enactment of a prohibition, or freeze, or moratorium as though it were an independent action, unrelated to any

---

of a property's future use, we *might* be compelled to conclude that a categorical taking had occurred. *We doubt, however, that a true temporary moratorium would ever be designed to last for so long a period.*" (App., p. 38; emphasis added.)

other action, the courts below permitted TRPA to effectively sterilize all productive use of this land indefinitely.[2]

Third, TRPA asserts: "Nor did the court of appeals hold that TRPA can 'compel[ ] a selected group of individual landowners to forego *all* use of their individual homesites, and thereby compel a *de facto* donation of their land for public use without compensation.' " (Br. In Opp., p. 7; emphasis original.)

It is difficult to understand what court of appeals opinion TRPA was reading. For the entire thrust of the decision below is that the few hundred owners of subdivided but undeveloped residential lots in zones 1, 2, 3, and SEZ have been put in *precisely* that position. However sliced, they may not use their land for any purpose. Period.

Moreover, to the extent that TRPA argues that – from the standpoint of any of the property owners at bench – there was any serious difference among the various plans and moratoria applied between 1981 and the present, the record belies it. (Eg., App., p. 76.)

Finally, TRPA continues its ploy of insisting that each regulatory freeze that it enacted, each stone that it added to the pile of regulatory prohibitions it forced these landowners to carry, must be viewed as an independent act,

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[2] This approach of viewing each component of a unitary problem as if it were a discrete event is often derisively referred to as "salami slicing tactics." It would be difficult to come up with a better example of such tactics than TRPA's argument.

disconnected from the others, and reviewable only on its own. (Br. In Opp., *passim*.)

This is a key flaw in TRPA's "salami tactics" argument that is common to many of the errors committed below. For example, the courts below refused to consider at all the use prohibition under the 1987 plan. That plan has been in effect for more than 13 years now. It is simply the latest in the series of prohibitory regulations enacted by TRPA to keep this land sterile. It didn't exist when the landowners filed their initial complaints in 1984. It was adopted while they were on appeal from initially having their complaints dismissed. Indeed, in *TSPC I*, the 9th Circuit dismissed as moot some of the claims regarding the 1984 plan, in light of its replacement by the 1987 plan. (App., p. 79.) On remand, the complaint was amended to include claims against the 1987 plan. (App., p. 80.) As the complaint being litigated was timely filed as to the regulations as they existed, an amendment to it should likewise have been timely – particularly since the landowners were on appeal at the time of the latter's adoption, fighting for their litigational life. (Compare *U.S. v. Dickinson*, 331 U.S. 745, 748-749 [1947], discussed at Pet., pp. 26-28.)

The same is true as to the 1984 plan itself. The courts below refused to permit any recovery for its three years of stultification on the ground that an injunction granted by a different judge in a different case precluded TRPA from issuing any permits. TRPA says that was a "fact-bound finding. . . . " (Br. In Opp., p. 14.) It was nothing of the sort. First, the District Court said it was a legal

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conclusion. (App., p. 105.)[3] Second, it is clear from the face of the 1984 Plan itself:

> "Development within land capability district 1-3 is not consistent with the goals to manage high hazard lands for their natural qualities and shall generally be prohibited except under extraordinary circumstances involving public works." (App., p. 173.)

The trial judge knew that. He noted that, for these landowners, "not much changed" from the 1981-1984 moratoria to the 1984 Plan; essentially *no* use was permitted. (App., p. 76.)

But, says TRPA, the injunction by the other judge " 'nullified' the Plan's 'escape mechanisms' which could have permitted development on petitioners' lots." (Br. In Opp., p. 15.) That's a misrepresentation of the record and of the 1984 Plan. The Plan as adopted *had no "escape mechanisms"* and TRPA cites none. The most that the trial court could say was that the injunction prevented TRPA *from considering whether to adopt* any such mechanisms, and what they might be. (App., p. 76.)

Understandably, TRPA doesn't want to address the reality that it created, or to have it reviewed by this Court.

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[3] The findings ended at App., p. 82, where the legal conclusions began.

II

WHETHER A REGULATION IS REASONABLE, AND WHETHER IT NONETHELESS REQUIRES COMPENSATION ARE SEPARATE QUESTIONS

There is no question that even the two year-eight month moratoria series examined by the 9th Circuit denied the landowners all economically productive use during that period. The trial court expressly so found (App., p. 99), and the Court of Appeals affirmed that factual finding (App., p. 40, fn. 30).

Where TRPA and the 9th Circuit got off the Constitutional track was in their theory that, as long as the moratorium was "reasonable", there could be no need to provide 5th Amendment compensation. They are wrong.

This Court has repeatedly held that the underlying substantive validity of even a reasonable regulation and the Constitutional need to compensate those injured by it are separate questions. That is plainly what the Court meant when it concluded that the 5th Amendment:

> "is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of *otherwise proper interference amounting to a taking.*" (*First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 [1987]; emphasis added.)[4]

It is simply too late in the day to suggest that the 5th Amendment's just compensation command can be

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[4] This Court has consistently so held. See cases cited at. Pet., p. 24, fns. 26 and 27.

trumped by governmental concern for enacting a regulation – no matter how useful, or even necessary, that regulation might be. As Justice Holmes wrote for the Court nearly a century ago, rephrasing the eternal verity that there is no such thing as a free lunch:

> "[T]he state has an interest independent of and behind the titles of its citizens, in all the earth and air in its domain. It has the last word as to whether its mountains shall be stripped of their forests and inhabitants shall breathe pure air. *It might have to pay individuals before it could utter that word,* but it remains the final power." (*Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 [1907]; emphasis added.)

The fact that the ends of government regulations may be of great benefit to society does not address the separate question of the means by which those benefits should be achieved, including the payment of compensation for those whose property is taken in the process. Put another way, the government may not take property without just compensation, no matter how desirable and important the reasons for the taking. Because "the public wanted it very much" (*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 [1922]) is not a permissible basis for gratifying that desire "by a shorter cut than the constitutional way of paying for the change." (*Id.* at 416.) Both TRPA and the 9th Circuit ignored this basic tenet of this Court's jurisprudence, necessitating this Petition.

CONCLUSION

The Petitioners have suffered grievously to provide the rest of us with protection for the national treasure known as Lake Tahoe. Under our Constitutional system, as this Court held in *Armstrong v. U.S.*, 364 U.S. 40, 49 (1960), they should not be singled out to do so. They cannot prevent the government from enacting regulations that preclude all economically productive private use of their land. But the 5th Amendment stands as a shield against their being compelled to do so at their own expense, without any compensation from those who benefit by preventing the use of this land.

The Petitioners pray that certiorari be granted and the 9th Circuit's decision be reversed so that they may finally receive the compensation the Constitution promises.

Respectfully submitted,

MICHAEL M. BERGER*
GIDEON KANNER
BERGER & NORTON
and
LAWRENCE L. HOFFMAN
HOFFMAN LAW OFFICES

Counsel for Petitioners
**Counsel of Record*

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No. 00-1167

In The

Supreme Court of the United States

TAHOE SIERRA PRESERVATION COUNCIL, Inc., A CALIFORNIA NON-PROFIT CORPORATION AND MEMBERSHIP ORGANIZATION, ET AL.

Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY, A SEPARATE LEGAL ENTITY CREATED PURSUANT TO BI-STATE COMPACT, et al.

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS AND JAMES NOLEN IN SUPPORT OF PETITIONER

CHRISTOPHER SENIOR
NATIONAL ASSOCIATION OF
HOME BUILDERS
1201 15TH STREET, NW
WASHINGTON, DC 20005
(202) 887-4626

*MARC B. KAPLIN, ESQUIRE
BARBARA ANISKO, ESQUIRE
Counsel of Record
KAPLIN STEWART MELOFF
REITER & STEIN, P.C.
SENTRY PKWY, BLDG 640
BLUE BELL, PA 19422
(610) 941-2666

Attorneys for Amici Curiae

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BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

Amici curiae, James A. Nolen, III ("**Nolen**") and the National Association of Home Builders ("NAHB") have received the written consent of both the petitioner and the respondents to submit this *amicus curiae* brief.[1] The letters of consent are appended to this Brief.

Nolen and the NAHB submit this *amicus curiae* brief in support of Petitioner Tahoe-Sierra Preservation Council, Inc.'s Petition for Writ of Certiorari in the case of *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Commission* because this case raises a fundamental constitutional issue concerning the rights of private landowners to obtain just compensation when they are denied all use of their properties by governmental regulation.

Until the United States Court of Appeals for the Ninth Circuit's decision in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 216 F.3d 764 (9th Cir. 2000) (the "**Tahoe-Sierra Decision**"), it was uniformly accepted that landowners are entitled to just compensation for temporary governmental regulations which have the effect of depriving landowners of all use and enjoyment of their land. In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), this Court made it clear that a regulation that deprives a landowner of all economically beneficial or productive use is a compensable taking. In *First English Evangelical*

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[1]Pursuant to Rule 37.6 of this Court, amicus state that their counsel authored this brief and amicus paid for it. This brief was not written in whole or part by counsel for a party, and no one other than amicus made a monetary contribution to its preparation.

Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987), this Court made it clear that a temporary taking during a planning moratorium requires compensation the same as a permanent taking. The Ninth Circuit's Tahoe-Sierra Decision incomprehensibly and unjustifiably rejects this Court's holdings and casts doubt upon these well-settled principles of constitutional law. The Ninth Circuit's Tahoe-Sierra Decision represents dangerous precedent and cannot be permitted to stand.

INTERESTS OF THE AMICUS CURIAE

Amicus Curiae Nolen is a residential developer who has witnessed the deleterious effects of the Ninth Circuit's Tahoe-Sierra Decision, and already suffered harm as the result of it. Nolen owns 95 acres of undeveloped land in Newtown Township, Delaware County, Pennsylvania. On November 23, 1998, the governing body of Newtown Township adopted an ordinance which prohibited the submission of subdivision or land development plans for an initial period of eighteen months (the **"Moratorium Ordinance"**). The Moratorium Ordinance was later extended for an additional four months. The effect of the Moratorium Ordinance was to prevent Nolen from making any use of his undeveloped property for the entire twenty-two months that the Moratorium Ordinance was in effect.

In January, 1999, Nolen brought a proceeding in the Court of Common Pleas of Delaware County, Pennsylvania seeking just compensation for the temporary taking of his property as a result of the Moratorium

Ordinance[2]. On February 12, 1999, Newtown Township filed preliminary objections contending that no temporary taking had occurred. In a well-reasoned five page Opinion, on June 29, 2000, the Court of Common Pleas found that the Moratorium Ordinance temporarily deprived Nolen of all economically viable use of his property for the twenty-two months that it was in effect and that this Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) required the payment of just compensation for his loss. Accordingly, the Court issued an Order denying the Township's preliminary objections and appointing a Board of View to determine the amount of just compensation to be awarded to Nolen.

However, approximately two weeks prior to the issuance of the Court's Order, the Ninth Circuit issued the Tahoe-Sierra Decision which directly contradicts this Court's holding in *First English*. After Newtown Township brought the Ninth Circuit's Tahoe-Sierra Decision to the Common Pleas Court's attention through the filing of a Motion for Reconsideration, on August 3, 2000, the Common Pleas Court vacated its June 29, 2000 Order denying the Township's preliminary objections and appointing a Board of View to determine the amount of just compensation to be awarded to Nolen. Therefore, the Ninth Circuit's Tahoe-Sierra Decision has already had the effect of reversing the clear mandate of *First English*.

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[2] Under Pennsylvania law, just compensation for the de facto taking of private property is sought through the filing of a Petition for the Appointment of a Board of View. If the Court determines that a taking has occurred, a Board of View is appointed to determine the amount of just compensation to be awarded to the Petitioner.

The NAHB represents over 204,000 builder and associate members throughout the United States who, like Nolen, may be adversely affected by the Ninth Circuit's Tahoe-Sierra Decision. Its members include not only people and firms that construct and supply single family homes, but also apartment, condominium, commercial and industrial builders, as well as land developers and remodelers. It is the voice of the American shelter industry.[3]

[3] The NAHB has appeared before this Court as an amicus curiae or as "of counsel" on behalf of the property owner in prior takings cases involving land use regulation. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas and Electric Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Pennel v. City of San Jose*, 485 U.S. 1 (1988); *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); and *City of Monterey v. Del Monte Dunes at Montery*, 526 U.S. 687 (1999).

THE TAHOE-SIERRA DECISION HAS FAR-REACHING IMPLICATIONS

This case directly affects 449 landowners who, through a series of rolling moratoria/prohibitions on land development imposed by the Tahoe Regional Planning Agency, have been deprived of their rights to use their land since 1981. However, in addition to those 449 landowners, the Ninth Circuit's *Tahoe-Sierra* decision indirectly affects countless landowners throughout this country who have been, or may become subject to, governmental regulations which prevent them from making any use of their properties for a fixed or undefined period of time. By declaring that municipalities may prevent the use or development of private property for a temporary period of time without the requirement of payment of just compensation to landowners, the *Tahoe-Sierra* decision invites municipalities to summarily halt development within their borders for indefinite periods of time without specific provocation and without any financial responsibility to the landowners whose properties are forced to remain undeveloped and unused by such action. Given the anti-development sentiment that already exists in many areas of this country, the *Tahoe-Sierra* decision could single-handedly bring development to a standstill.

For these reasons, the NAHB and Nolen urge this Court to grant Petitioner's Petition for Writ of Certiorari and to reverse the Ninth Circuit's Tahoe-Sierra Decision.

DATED: February 20, 2001

Respectfully submitted,

*Marc B. Kaplin, Esquire
Barbara Anisko, Esquire
**Counsel of Record for Amici Curiae*
Kaplin Stewart Meloff Reiter & Stein, P.C

Christopher Senior
National Association of Home Builders

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TAHOE-SIERRA PRESERVATION COUNCIL, INC.,
a California non-profit corporation and
membership organization, et al.,

Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY,
a separate legal entity created pursuant to
Bi-State Compact, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

MERIEM L. HUBBARD
Counsel of Record
R. S. RADFORD
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932
Counsel for Amicus Curiae
Pacific Legal Foundation

191 P

QUESTIONS PRESENTED

1. In light of this Court's clear holding that a temporary moratorium on land use *can* require compensation for a temporary taking of property (*First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987)), is it permissible for the Ninth Circuit Court of Appeals to hold—as a matter of law—that a temporary moratorium can *never* require constitutional compensation?

2. Can a land use regulatory agency escape its constitutional duty to pay for land taken for public use by the expedient of enacting a series of rolling, back-to-back "temporary" moratoria/prohibitions extending over a period of 20 years, and then claiming that each of the individual prohibitions on *all* use must be viewed in isolation from the others and, when so viewed, none was severe enough by itself to cross the constitutional taking threshold?

In similar fashion, can such an agency escape the constitutional obligation of compensation because a court injunction issued in a *different* case barred issuing permits to *other* landowners, while the agency's own regulations precluded all use of the Petitioners' land?

3. Can a land use regulatory agency purport to "protect the environment" at a major regional location (here, Lake Tahoe) by compelling a selected group of individual landowners to forego *all* use of their individual homesites, and thereby compel a *de facto* donation of their land for public use without compensation?

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INTEREST OF AMICUS CURIAE[1]

For more than 25 years, Amicus Pacific Legal Foundation (PLF) has been litigating in support of the rights of individuals to make reasonable use of their private property. PLF attorneys have been before this Court on three occasions representing individuals whose right to use their property was unlawfully denied by government agencies. *See Palazzolo v. Rhode Island*, No. 99-2047 (argued on Feb. 26, 2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). And PLF has participated as amicus curiae in nearly every major real property takings case heard by this Court in the past two decades.

PLF previously participated as amicus curiae in this case. PLF filed amicus briefs in support of Tahoe-Sierra Preservation Council and others (Petitioners herein) on appeal from the United States District Court for the District of Nevada and in support of a petition for rehearing en banc of the Ninth Circuit panel's decision on appeal. PLF believes that its public policy perspective and litigation experience will provide an additional viewpoint on the issues presented in this case. Specifically, PLF argues that the Ninth Circuit Court's decision in this case conflicts with this Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). PLF also argues that it is common in property law to divide interests into temporal segments, and that a contrary approach—a theory of the

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

temporal whole—in takings law does not provide the individual protections required by the Constitution.

STATEMENT OF THE CASE

Petitioners are owners of single-family residential lots in the Lake Tahoe Basin. On June 25, 1981, the Tahoe Regional Planning Agency (TRPA) adopted the first in a series of moratoria prohibiting residential use in parts of the Lake Tahoe region involved in this litigation. The "temporary" building prohibition lasted 20 years, and prevented Petitioners from building residences or making any other economically reasonable use of their property during that period of time.

Petitioners filed an action asserting that TRPA's restrictions on the use of their lots amounted to temporary takings of private property for public use without just compensation. The United States District Court for the District of Nevada agreed and held that Ordinance 81-5 and Resolution 83-21 constituted a categorical taking of Petitioners' property and awarded Petitioners compensation for the regulatory taking. In reaching this conclusion, the court made the following finding of fact: Ordinance 81-5 and Resolution 83-21 did in fact deny the Petitioners all economically viable use of their land. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 34 F. Supp. 2d 1226, 1243-45 (D. Nev. 1999).

On appeal, the Ninth Circuit Court of Appeals reversed, although it accepted the factual finding that TRPA's moratoria effectively deprived Petitioners of all economically viable use of their property. Instead, the reversal was based on the court's assertion that the Takings Clause does not require compensation when a regulation is intended from the outset to last for a limited period of time. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 216 F.3d 764, 777 (9th

Cir. 2000). This ruling directly conflicts with the established precedent of this Court on a question of federal constitutional law.

SUMMARY OF ARGUMENT

This case asks whether the Takings Clause of the Fifth Amendment requires that government compensate private property owners when building moratoria deny all economically viable use of their property, or whether, to the contrary, there is something about building moratoria that allows government to deny use of property without compensating the property owner. Because moratoria can affect landowners to the same extent as permanent regulation, the question of whether moratoria can create takings goes to the heart of the Constitution's protection of private property.

The Ninth Circuit Court of Appeals held that building moratoria are different from other government activity that violates the Fifth Amendment because moratoria are intended to be temporary and deny landowners all use of their property for only a small piece of the "temporal whole." Thus, under the Ninth Circuit's theory, property owners cannot receive compensation for the time they are denied use of their property because the property may retain some value after moratoria are lifted. In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-15 (1922), Justice Holmes explained that government's power to redefine the range of interests included in the ownership of property is constrained by the Constitution. Justice Holmes was discussing the enforcement of the protection against physical appropriations, but the message is no less applicable to regulatory takings cases.

> If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, "the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappeared."

Lucas, 505 U.S. at 1014 (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 415).

In this case, the Ninth Circuit's theory of the "temporal whole" defines property interests so broadly that moratoria, temporary by nature, cannot create a temporary taking. This is so even if moratoria last for decades and deprive all use of property for a large chunk of the temporal slice that makes up the property owner's life. Under the Ninth Circuit's ruling, a landowner's private property rights can disappear, and no compensation is due for the loss. That result conflicts with decisions of this Court and of various state courts that recognize temporary takings can and do result from building moratoria, and disregards the focus of the Takings Clause—the impact of regulation on the individual property owner, not the advantage realized by the sovereign.

ARGUMENT

I

THE OPINION BELOW CONFLICTS WITH THE LONG-ESTABLISHED PRECEDENT OF THIS COURT

A. The Theory of the "Temporal Whole" Applied by the Ninth Circuit to Deny Appellants' Takings Claim Is Unsupportable After *Lucas v. South Carolina Coastal Council*

The Takings Clause of the Fifth Amendment to the United States Constitution consists of just 12 words, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. But the simple and clear mandate of the Takings Clause has proven far from simple to apply to the myriad circumstances where the interests of government and private property owners intersect. In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), this Court noted the difficult task of determining what constitutes a taking.

> [T]his Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case."

Citations omitted.

The question in *Penn Central* was whether denial of an application to construct an office building on top of New York City's famous Grand Central Terminal constituted a taking. The proposed addition to the Terminal violated a Landmarks Preservation Law under which the Terminal was designated a landmark and the "city tax block" it occupied was designated a "landmark site." Appellant owners of the Terminal also owned other property in the same area of midtown Manhattan.

The *Penn Central* majority noted that takings cases examine the character of government action and the nature and extent of interference with rights in the parcel as a whole. *Id.* at 130-31. " 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Id.* at 130. The interference with appellants' property rights in *Penn Central* was insufficient to effect a taking because the restrictions "afford appellants opportunities further to enhance not only the Terminal site proper [(the City tax block)] but also other properties." *Id.* at 138. Thus, the relevant parcel for takings analysis included not only the air space above the Terminal, but the Terminal itself, the land on which it sits, and appellants' other properties in the area.

The aggregation of interests in *Penn Central* was condemned 14 years later. In *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1016 n.7, this Court cited *Penn Central* as "an extreme—and, we think, unsupportable—view of the relevant calculus." Yet, in this case, the Ninth Circuit Court of Appeals employed the very technique disapproved in *Lucas* to arrive at a theory of the "temporal whole." *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 216 F.3d at 776-77.

The Ninth Circuit Court noted that the relevant property interests are the "whole parcels of property that [Petitioners] own." *Id.* at 779. Apparently, those whole parcels include the "use" of the property "from the present to the future." *See id.* at 782. Development moratoria, according to the court, are "finite temporal segments" (*id.* at 778) that deny Petitioners "only a small portion of this future stream; the 32 months during which the moratorium was in effect represents a small fraction of the useful life of the Tahoe properties" (*id.* at 782). Because the moratorium on development did not deprive Petitioners of all future use of their property, there was no taking. Government did not interfere with the rights in the "temporal whole" of Petitioners' property rights.

In the same way the *Penn Central* majority increased the physical size of the relevant parcel by including other nearby properties owned by the same entity, the Ninth Circuit Court increased the "temporal size" of the relevant property interest by looking at the economically viable use a property retains after development moratoria have run their course. Under the Ninth Circuit's theory, a development moratorium lasting 3 years or 25 years would not constitute a taking of the "temporal whole" because there is a potential for an economically viable use of property sometime in the future.

The "parcel as a whole" language in *Penn Central* describes the physical property that constitutes the relevant

parcel in a regulatory takings claim. In *Tahoe-Sierra*, the Ninth Circuit Court divides property into different dimensions—spatial, functional, and temporal—and attempts to force all three into a "parcel as a whole" type theory. *See Tahoe-Sierra*, 216 F.3d at 774-76. In other words, a taking occurs when government allows no use (the functional dimension) of an entire parcel (the spatial dimension), for the useful life of the property (the temporal dimension). *See id.* at 776. The Ninth Circuit Court does make one exception—severance of the spatial dimension, according to the court, is the norm in physical appropriation cases. *Id.* at 779.

Depending on the facts of a case, it may be that there is no taking when government denies some, but not all, economically viable use of a parcel or when government denies all use of only a discrete portion of a parcel. But it does not follow that there is no taking when government denies all use of property for a period short of its useful life. The reality is that the useful life of land generally far exceeds the human life span. Thus, the Ninth Circuit's rule could easily deprive landowners of all use of their land for an entire lifetime—the only relevant "temporal dimension" from the viewpoint of the individual whose rights are supposed to be protected by the Constitution.

B. Property Law Routinely Divides Property Interests into Temporal Segments

The Ninth Circuit denied Petitioners' takings claims because, according to the court, development moratoria deny economically viable use of property for only a "temporal slice" of the total fee interest. *Tahoe-Sierra*, 216 F.3d at 779. The court ignores the fact that property law—even takings law—routinely divides property interests into temporal segments. Property interests are divided into present interests and future interests, a life estate, or estates for years (leases for several years, a single year, months, or weeks). Each of these interests

includes the use of property for a "temporal slice" of the total fee interest.

In *United States v. General Motors Corporation*, 323 U.S. 373, 374 (1945), this Court had no trouble requiring compensation for the temporary taking of a leasehold interest. The United States exercised its power of condemnation under the Second War Powers Act of March 27, 1942, to temporarily occupy—for one year—a portion of a warehouse building leased to General Motors for a period of 20 years. *Id.* at 375-76. This Court examined the scope and meaning of critical terms in the Takings Clause. "Property" encompasses each of the interests a citizen holds in a physical thing. *Id.* at 377-78. An individual's interest

> may comprise the group of rights for which the shorthand term is "a fee simple" or it may be the interest known as an "estate or tenancy for years," as in the present instance. *The constitutional provision is addressed to every sort of interest the citizen may possess.*

Id. at 378 (emphasis added).

The term "taken" focuses on the deprivation experienced by a property owner and not on the interest acquired by government. *Id.* Thus, "[g]overnmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking." *Id.* The amount of compensation constituting "just compensation" depends on the interest taken—whether government takes an owner's whole interest, or chops an owner's interest "into bits, of which it takes only what it wants, however few or minute, and leaves him holding the remainder, which may then be altogether useless to him." *Id.* at 382.

The piece chopped from the owner's interest in *United States v. General Motors Corporation* was the period of time General Motors was denied all use of its leasehold interest. *Id.* And the need to pay compensation was based on the temporary deprivation of use of the property—it did not depend on government's physical occupation of the property.

> [W]hether the sovereign substitutes itself as occupant in place of the former owner, or destroys all his existing rights in the subject matter, the Fifth Amendment concerns itself solely with the "property," i.e., with the owner's relation as such to the physical thing and not with other collateral interests which may be incident to his ownership.

Id. at 378.

In another War Powers Act case, *Kimball Laundry Co. v. United States*, 338 U.S. 1, 6 (1949), this Court upheld an award of just compensation for a temporary taking of land, plant, and equipment, and determined that the United States should have paid compensation for the going-concern value of the family laundry business (*id.* at 16). As in *General Motors Corporation*, the deprivation of use of property for a limited period of time was key (*see id.* at 6, 14-15). The temporary taking interrupted an ongoing business, thereby appropriating an established customer base and forcing the owners of the laundry to wait and see what remained of their investment when government was finished using the property. *Id.* at 14-15 & n.6.

General Motors and *Kimball Laundry* were both condemnation cases, but the same reasons for compensating a temporary denial of use of property apply in the context of regulatory takings. *See Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 177-78 (1871). The deprivation experienced by a property owner is the same regardless of the mechanism utilized by government to deny all use of the property. In *First English Evangelical Lutheran Church of Glendale v. County of Los*

Angeles, 482 U.S. 304, 318 (1987), this Court acknowledged that temporary takings denying all use of property "are not different in kind from permanent takings, for which the Constitution clearly requires compensation."

II

THE LOWER COURT'S FAILURE TO RECOGNIZE TEMPORARY REGULATORY TAKINGS CONFLICTS WITH DECISIONS OF STATE COURTS

State courts recognized temporary regulatory takings even before *First English*. In *Schiavone Construction Co. v. Hackensack Meadowlands Development Commission*, 486 A.2d 330 (N.J. 1985), a series of resolutions placed a 19-month moratorium on real estate development. *Id.* at 331-32. The Supreme Court of New Jersey determined that temporary land use restrictions may constitute a taking if sufficiently extensive and prolonged. *Id.* at 332-33.

The New York Court of Appeals, in a post-*First English* case, found both physical and regulatory takings when New York City imposed a moratorium on the demolition or conversion of structures containing single-room occupancy units and required that owners rehabilitate all vacant units and offer them for rent. *Seawall Associates v. City of New York*, 542 N.E.2d 1059, 1060-61 (N.Y.), *cert. denied*, 493 U.S. 976 (1989). The court held that the loss of possessory interests—including the right to exclude—constituted a per se physical taking. *Id.* at 1064. The law also created a regulatory taking by "'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole'" (*id.* at 1065 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960))), and by depriving owners of the right to make economically viable use of their properties (*id.* at 1066-67).

St. Aubin v. Biggane, 381 N.Y.S.2d 533 (1976), a New York Supreme Court, Appellate Division, case, dealt with a moratorium that prevented plaintiffs from deriving any economic advantage from their property for two-and-a-half years, and that allegedly would continue to deny all use for another year-and-a-half. *Id.* at 535. The New York court held that the facts raised a constitutional takings claim and that a moratorium cannot last for an unreasonable time. *Id.*

These state courts had no trouble finding that takings may result from government acts that deny all use of private property for a period of time less than the temporal whole—even when those acts were never intended to be permanent.

III

THERE IS NO CONSTITUTIONAL DIFFERENCE BETWEEN A PERMANENT REGULATION INVALIDATED AS AN UNCONSTITUTIONAL TAKING AND A TEMPORARY REGULATION THAT EFFECTS A TAKING

The Ninth Circuit Court decided that temporary takings are created when ordinances that create permanent takings are invalidated—temporary takings are not created by moratoria designed from the outset to last for a limited period of time. *Tahoe-Sierra*, 216 F.3d at 778. But government can create a temporary taking under the Fifth Amendment in the same way it creates permanent takings. A regulation that does not substantially advance a legitimate state interest or that denies an owner economically viable use of his property effects a taking. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). "[T]otal deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1017.

Development moratoria, originally intended to last for a brief period of time, can and oftentimes do remain in effect for

many months or even years.[2] Indeed, as demonstrated by the facts of the case before this Court, temporary planning prohibitions may be effective for at least as long as a "permanent" regulation that is challenged and invalidated in a court of law. Under the Ninth Circuit's rule that temporary moratoria cannot give rise to a taking, a landowner denied all use of his property for five years pursuant to a temporary building moratorium will not be compensated for a temporary taking. But a landowner denied all use of his property for five years pursuant to a "permanent" regulation that is invalidated by a court is entitled to compensation for a temporary taking. This result might be supportable if the purpose of the Fifth Amendment were to punish wrong or irresponsible regulatory activity. But it is not—the Fifth Amendment protects and secures the rights of the individual as against government by providing that a landowner must be compensated when his property is taken for a public use. U.S. Const. amend. V; *see Pumpelly v. Green Bay Co.*, 80 U.S. at 177-78.

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[2] *See, e.g., Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1068 (11th Cir. 1996), *cert. denied*, 522 U.S. 981 (1997) ("Originally, the moratorium was to last for 150 days, but it eventually was extended to last almost a year."); *Seawall Associates v. City of New York*, 542 N.E.2d at 1061 (city imposed 18-month moratorium on demolition or conversion of some residential structures, which was extended for five months; a subsequent law "extended the prior moratorium for an initial five-year period with the possibility of unlimited renewals"); *Bank of the Orient v. Town of Tiburon*, 269 Cal. Rptr. 690, 691-92 (Ct. App. 1990) (town adopted a "45-day interim urgency ordinance," which was extended for two months and extended again for a year; voters adopted additional "development moratorium" intended to last "some 15 months longer than the previously enacted moratorium").

The Ninth Circuit Court's decision was based, at least in part, on concern about the possibility of the widespread invalidation of temporary planning moratoria.

> Given the importance and long-standing use [of] temporary moratoria, courts should be exceedingly reluctant to adopt rulings that would threaten the survival of this crucial planning mechanism.

Tahoe-Sierra, 216 F.3d at 777.

But, in *Pumpelly*, Justice Miller made it clear that the paramount concern should be the impact of government activity on the individual.

> It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provisions into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority

> for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.

Pumpelly v. Green Bay Co., 80 U.S. at 177-78.

Although the useful life of the Tahoe properties may extend well beyond TRPA's planning moratorium, the lives of the individual property owners represent much smaller slices of the temporal whole. Property owners should not be denied compensation for the 20-year period they were unable to use their property just because the property is expected to retain some value when the moratorium is lifted.

CONCLUSION

For these reasons, Amicus respectfully requests that this Court grant the petition for writ of certiorari.

DATED: March, 2001.

Respectfully submitted,

MERIEM L. HUBBARD
Counsel of Record
R. S. RADFORD
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932
Counsel for Amicus Curiae
Pacific Legal Foundation

No. 00-1167

(20)

In The

Supreme Court of the United States

TAHOE SIERRA PRESERVATION COUNCIL, INC., a California non-profit corporation and membership organization, *et al.*,

Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY, a separate legal entity created pursuant to Bi-State Compact, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

MICHAEL M. BERGER*
GIDEON KANNER
BERGER & NORTON
A LAW CORPORATION
1620 26th Street
Suite 200 South
Santa Monica, CA
90404-4040
(310) 449-1000

LAWRENCE L. HOFFMAN
HOFFMAN LAW OFFICES
3000 No. Lake Boulevard
Post Office Box 7740
Tahoe City, CA 96145
(530) 583-8542

Counsel for Petitioners

**Counsel of Record*

E. CLEMENT SHUTE, JR.*
FRAN M. LAYTON
ELLISON FOLK
SHUTE, MIHALY & WEINBERGER LLP
396 Hayes Street
San Francisco, CA 94102
(415) 552-7272

Counsel for Respondents

(Additional Counsel for Respondents listed on inside cover)

Petition For Certiorari Filed January 18, 2001
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COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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JOHN L. MARSHALL
TAHOE REGIONAL
PLANNING AGENCY
P.O. Box 1038
Zephyr Cove, NV 89448
(775) 588-4547

BILL LOCKYER
Attorney General of the
State of California
RICHARD M. FRANK
Chief Assistant
Attorney General
MATTHEW RODRIGUEZ
Senior Assistant
Attorney General
DANIEL L. SIEGEL
Supervising Deputy
Attorney General
MARY J. SCOONOVER
Deputy Attorney General
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
(916) 445-9555

FRANKIE SUE DEL PAPA
Attorney General
of the State of Nevada
WILLIAM J. FREY
Deputy Attorney General
100 North Carson Street
Carson City, NV 89701
(775) 687-6532

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Lawrence L. Hoffman
Gregg R. Lien
Philip A. Olsen
HOFFMAN, LIEN, FACCINTO
GARNETT & LIEBERMAN
Post Office Box 7740
Tahoe City, California 96145
(916) 583-8542
(702) 831-8542

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

The TAHOE-SIERRA PRESERVATION COUNCIL INC., a California non-profit corporation and membership organization; BRUCE A. AMES and JUDITH M. AMES; LAURA L. ANDERSON and JAMES E. ANDERSON; ALFRED J. ANTONINI; CAROLYN J. APPLEBY; EDWARD ARRI and BARBARA ARRI; GEORGE P. ASCHE and PRISCILLA J. ASCHE; LEONARD W. ASCHER and ADELINE H. ASCHER; ALPINE INVESTMENT; NICK BADAMI; WES BALLARD; M.A. BEHR and ESTHER M. BEHR,	CIV. NO: CVN 92-98-ECR (Base File) (FILED MAR 17 1992) FIRST AMENDED CALIFORNIA-SIDE COMPLAINT FOR INVERSE CONDEMNATION, DENIAL OF CONSTITUTOINAL AND CIVIL RIGHTS, AND JUST COMPENSATION AND DAMAGES (California-Side) PLAINTIFFS DEMAND A JURY TRIAL

CLARENCE C. BENEDICT; MAX V. BENTLEY and MINNIE R. BENTLEY; LEROY G. BLACK; RICHARD A. BLASCO and AIDA M. BLASCO; ARLETTE I. BROWN; ARTHUR C. BYSTROM; ALLAN F. CASE and TERUKO CASE; DON N. CHOATE and LORRAINE E. CHOATE; EDWARD W. CISLO, JR. and LA VERNE C. CISLO; JAMES D. CLEMENT; ROBERT D. COLCLAZIER; JAMES R. COMPTON; CARL D. COOK; DOROTHY MAE COOK; HAROLD F. CORNELIUS; JOAN COSTA; DONALD COTTEN; OLGA R. CROSETTI; ALAN W. DAGG; GWENDOLYN IONE DAY; EDDY K. DAYNE and ANNE M. DAYNE; RICHARD DEFENBAUGH and TERESA DEFENBAUGH; JOHN J. DESTEFANO; JESS R. DETEVIS and DIANE DETEVIS; ROBERT E. DIXON and JUDITH E. DIXON;

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and NELLIE O. GRAF;)
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DEVELOPMENT,)
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LORRAINE E. HESS;)
DOUGLAS J. HINDS and)
MARIAN O. HINDS; J.C.)
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HITT; LOREN)

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JAVORSKY; K.D.)
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WINNIFRED A.)
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L. JELLINS; RUDOLPH)
JOHNSON and PATRICIA)
JOHNSON; ARNE)
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TEDDYANNA P. KEELE;)
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LADONNA KERTON;)
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MANDOLI and ALICE)
M. MANDOLI;)
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MARSHALL; LEONARD)

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ELREE; FRANK J.)
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SHARON M. MERRITT;)
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CONSTANCE NOIA;)
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and JACQUELINE)
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PORTER, LUCILLE)
PRATHER; RICHARD)
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VIRGINIA RUTH)
PRITCHETT; FRANK A.)
QUADROS and)
FRANCES M.)
QUADROS; WILLIAM R.)
RAMSEY and LINDA R.)
RAMSEY; RUDY)
REGALADO and)
JOSEPHINE M.)
REGALADO; SARAH)
REYNOLDS and)
SARGENT REYNOLDS;)
ROBERT W. RIEB;)
QUENTIN H. RINK;)
GEORGE R. ROBINSON;)
ROCKY RIDGE)
PROPERTIES; LARRY D.)
RUDY; EUGENE SAKAI)
and BETTY SAKAI;)
JOHN G. SANCHEZ and)
MARY M. SANCHEZ;)
E.S. SARRO and)
ELEANOR M. SARRO;)
CHARLES OLIVER SASS;)
PATRICK N. SATALINO;)
DONALD E. SAUNDERS)
and GWEN SAUNDERS)
(DECEASED);)
FREDERICK SCHULZ;)
DAVID J. SHERDEN)

and SHARON L.)
SHERDEN; SEIJI SHIBA;)
BRUCE E. SIMKINS; J.)
ROCKWELL SMITH and)
PATRICIA SMITH;)
BERTRAM S. SOLOMON)
and SYLVIA M.)
SOLOMON; MARK)
THOMAS SPRAGGINS;)
EDWARD K. STEARNS;)
FREDERICK A. STREIB)
and ROSEMARY STREIB;)
SUGARPINE)
INVESTMENTS, INC.;)
A.J. SULME; DONALD P.)
SWAN; TAHOE ALPINE)
PROPERTIES LTD.;)
WILLIAM E. THACKREY)
and SYLVIAN E.)
THACKREY; LORENE)
THOMAS; LINDA A.)
THOMPSON and ALLAN)
J. THOMPSON; ROBERT)
E. TOLBERT and IRENE)
TOLBERT; FRANK W.)
TRABUCCO and MARY)
S. TRABUCCO; JAMES)
R. TREMBATH;)
DONALD PAUL)
TURNER and DORIS A.)
TURNER; U-HAUL CO.)
OF SACRAMENTO;)
NEALAND R.)
UNDERWOOD and)
DELLA UNDERWOOD;)
RON UHARRIET;)

ROBERT URSO; RICHARD G. VENTRESCO and DARLEEN P. VENTRESCO; NORBERT A. WALZ, SR.; CAROLE A. WARD; WEST BAY ENTERPRISES; LAMBERT P. WILLIE; ROBERT H. WILLIAMS; WOODROW H. WILSON and BARBARA C. WILSON; JOHN A. WOLLMAN; ROBERT C. WORKS and PATRICIA W. WORKS; GRACE YA-CHIN LIN PAN; PETER I. YAMAMOTO and MIDORI M. YAMAMOTO; ENRIQUE J. ZOLLNER (DECEASED) and PILAR FERNANDEZ ZOLLNER; THEODORE CAROL ZSUTTY and MARIE ROSE ZSUTTY; VIRGINIA R. ZUCK; and JEFFREY G. ZYBURA and LANA R. ZYBURA.

Plaintiffs,

v.

The TAHOE REGIONAL PLANNING AGENCY, a separate legal entity created pursuant to an interstate Compact between the States of California and Nevada; the State of Nevada; and the State of California,

Defendants.

Plaintiffs allege as follows:

I. INTRODUCTION*

This First Amended Complaint for Inverse Condemnation, Denial of Constitutional and Civil Rights, and Just Compensation and Damages ("First Amended California-Side Complaint") is being filed pursuant to the Order of this Court entered at a status conference held before this Court on March 13, 1992.

This action was originally filed on June 25, 1984 following the adoption by the TRPA of its 1984 Regional Plan as described and alleged more fully hereinbelow. After hearing on motions to dismiss, the District Court entered its Order on January 22, 1985 dismissing the monetary claims against the Defendants. Subsequently, on March 27, 1987, the District Court, after hearing, granted summary judgment to the Defendants as to the remaining claims seeking declaratory and injunctive relief. The matter was then appealed to the Ninth Circuit,

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* For the convenience of the Court, all additions of new matter to this First Amended Complaint and its Appendices are shown in bold type.

where it was stayed pending that Court's decision in *TSPC I* – the companion Nevada-side case.

Subsequently, following its decision in *TSPC I*, the Ninth Circuit ordered briefing and argument, following which a separate three-judge panel of that Court issued its opinion in this matter on July 8, 1991. (*Tahoe-Sierra Preservation Council, Inc., et al v. Tahoe Regional Planning Agency, et al.*, 938 F.2d 153 (9th Cir. 1991) ["*TSPC II*"].) That unanimous decision in *TSPC II* generally followed the decision of the Ninth Circuit panel in *TSPC I*, except as to that portion of the latter's divided decision in which it had found that Plaintiffs' damage claims arising from its facial challenge against the 1984 Regional Plan were not ripe because Plaintiffs had not first applied for an amendment to that Plan. (*TSPC I*, Section III.A, 911 F.2d 1336-39.) The three-judge panel in *TSPC II* relied on the rational [sic] of Judge Rozinski in his dissent in *TSPC I*, and concluded that the district court had improperly dismissed the Plaintiffs, Section 1983 and Fifth Amendment takings claims-against TRPA for damages caused by the 1984 Regional Plan. Subsequently, the Defendants/Appellees' request for rehearing and/or suggestion for hearing en banc was denied by the Ninth Circuit on September 19, 1991, and the matter remanded to this Court on December 10, 1991. Thus, on remand to the District Court, two separate Ninth circuit opinions offer direction and guidance.

Thereafter, with the concurrence of the parties, the Eastern District of California transferred venue of this case (the California-side case) to the District of Nevada. By its order dated February 21, 1992, this Court then

ordered the consolidation of the instant case (the California-side case) with the pending Nevada-side companion case. [See Introduction to First Amended Nevada-side Complaint filed on October 28, 1991 for additional explanatory background.]

To respond to the directions of the Ninth Circuit and related issues, this First Amended Complaint is being filed to address the following specific matters:

(1) This First Amended Complaint dismisses 149 individual Plaintiffs owning 91 separate properties, as those Plaintiffs have chosen no longer to pursue this litigation having previously sold their property to a public buy-out agency. All references in this Complaint and related Appendices to these Plaintiffs have been deleted: (294 named Plaintiffs owning 258 lots/parcels remain in this action.) Also dismissed are the voting members of the TRPA Governing Body named as defendants in the original Complaint.

(2) The First, Third, and Fourth Claims for Relief in the original complaint have been deleted pursuant to the direction of the Ninth circuit that they be dismissed by the district court on mootness grounds. The Sixth Claim for Relief has also been voluntarily dropped, as Plaintiffs are unable to make the showing required by the Ninth Circuit that it was TRPA itself which collected the assessments for the public improvements at issue. In addition, certain portions of the general allegation provisions of the original Complaint bearing on these foregoing claims have also been

deleted for clarification and simplification. The remaining Second, Fifth, and Seventh Claims have been retained and renumbered in the amended Complaint as the First, Second, and Third Claims for Relief respectively.

(3) While the Ninth Circuit, in both *TSPC I* and *TSPC II*, made it clear that the Plaintiffs' takings claims commenced on June 25, 1981, the date of adoption of the predecessor interim ordinance 81-5, the length or terminal point of the "takings period" for each Plaintiff is yet to be determined. While it is true that TRPA adopted its new 1987 Regional Plan on June 1, 1987, which superseded its earlier 1984 Regional Plan (and ordinance 81-5), nevertheless that 1987 Regional Plan effectively carried forward, until at least July 1, 1989, and as to the SEZ Plaintiffs until the present, the very same total prohibitions on building or use of lots identified as SEZ, or Class 1, 2, and 3 originally established in ordinance 81-5 and made permanent by the 1984 Regional Plan. Even when the 1987 Regional Plan's new individual Parcel Evaluation System (IPES) formally took effect on July 1, 1989, as described more fully below, a significant number of named Plaintiffs' properties were again classified or scored by TRPA in manner that continued to make them unbuildable, therefore prolonging the period of total denial and prohibition on the use of those properties originally resulting from the enactment of the 1984 Regional Plan and the predecessor Ordinance 81-5. Further, during the course of

this litigation, a substantial number of the named Plaintiffs were compelled, absent any other economically viable alternative, to sell their properties to the U.S. Forest Service or the State of California pursuant to the public buy-out programs of those agencies. While the takings period applicable to those named Plaintiffs, properties can be said to have ended as of the date of those sales, as set forth in this First Amended Complaint Plaintiffs contend that the take-it-or-leave-it purchase prices offered by those buy-out agencies fell far short of providing constitutionally-required Just Compensation, in that in most cases those government acquisition prices had been substantially depressed by virtue of TRPA's absolute prohibition on building on Plaintiffs, properties. In no event did the compensation offered to or received by any of the named Plaintiffs provide them just compensation for the period of the temporary taking prior to the date of the acquisition by the public buy-out agency. Specific allegations bearing on events that transpired after the date of the filing of this action which go to the issue of the length of the takings period for each named Plaintiff are set forth hereinbelow at Paragraphs 31-34, as well as in the specific allegations regarding the circumstances applicable to each of the properties at issue in this action set forth in the pertinent Appendices attached hereto and incorporated herein.

(4) Additionally, as relevant to the claims made herein, certain additional allegations are included to "conform to proof" and/or to

determinations made by the district court or the Ninth Circuit in the previous proceedings in this matter, such as clarifying the relationship of the predecessor interim ordinance 81-5 which the Ninth Circuit specifically found had been "made permanent" by the 1984 Regional Plan.

(5) Finally, certain changes are made for clarification, consistency, simplification, or editorial correction, and paragraphs and/or claims have been re-numbered appropriately.

II. JURISDICTION AND VENUE

1. **This action alleges a regulatory taking of private property without Just Compensation in contravention of the Fifth and Fourteenth Amendments to the Constitution and a violation of 42 U.S.C. §§ 1983 and 1985 arising from the enactment by the Defendant TAHOE REGIONAL PLANNING AGENCY ("TRPA") of certain land use regulatory measures described hereinafter. Plaintiffs assert those regulatory measures denied them all reasonable use of their private property for a substantial period of time, generally for periods of at least 6 to 11 years. The Defendant TRPA is a bi-state planning body formed by an interstate compact, and this action therefore arises under the** Compact Clause (Article 1, Section 10, Clause 3) of the Constitution of the United States, the Fifth and Fourteenth Amendments to the Constitution of the United States, the Federal Civil Rights Act (42 U.S.C. Secs. 1983 and 1985), 28 U.S.C. Secs. 2201 and 2202 (Declaratory Relief), and the Tahoe Regional Planning Compact (P.L. 96-551; 94 Stat. 3233) as

hereafter more fully appears. Jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Secs. 1331 and 1343 and Article VI(j) of the Tahoe Regional Planning Compact (hereafter the "Compact").*

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* Article VI(j) of the Compact reads in pertinent part:

"(j) Legal actions arising out of or alleging a violation of the provisions of this compact, of the regional plan or of any ordinance or regulation of the agency or of a permit or a condition of a permit issued by the agency are governed by the following provisions:

(1) This subdivision applies to:

(A) Actions arising out of activities directly undertaken by the agency.

(B) Activities arising out of the issuance to a person of a lease, permit, license or other entitlement for use by the agency.

(C) Actions arising out of any other act or failure to act by any person or public agency.

Such legal actions may be filed and the provisions of this subdivision apply equally in the appropriate courts of California and Nevada and of the United States.

(2) Venue lies:

(A) If a civil or criminal action challenges an activity by the agency or any person which is undertaken or to be undertaken upon a parcel of real property, in the state or federal judicial district where the real property is situated.

(B) If an action challenges an activity which does not involve a specific parcel of land (such as an action challenging an ordinance of the agency), in any state or federal court having jurisdiction within the region.

2. Venue is proper in this Court pursuant to Article VI(j) of the Compact and 28 U.S.C. Secs. 1391 et seq., in that all real properties which are the subject of this action are situated in the State of California.

III. NATURE OF ACTION

3. This action challenges the validity and constitutionality of certain specific provisions of the "Regional Plan for the Lake Tahoe Basin" adopted on April 26, 1984 (hereafter the "Regional Plan" **or the "1984 Regional Plan"**) by the Governing Body of the Defendant TRPA, allegedly pursuant to the Tahoe Regional Planning Compact*, **which Regional Plan provisions made**

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(3) Any aggrieved person may file an action in an appropriate court of the State of California or Nevada or of the United States alleging noncompliance with the provisions of this compact or with an ordinance or regulation of the agency. * * *

(4) A legal action arising out of the adoption or amendment of the regional plan or of any ordinance or regulation of the agency . . . shall be commenced within 60 days after final action by the Agency. * * * "

* The original Tahoe Regional Planning Compact, an interstate agreement, was adopted by the States of California and Nevada and approved by the Congress and signed by the President on December 18, 1969. See P.L. 91-148, 83 Stat. 360; California Government Code Section 66801; Nevada Revised Statute 277.200. Said Compact was extensively amended in 1980 by legislative enactments of the States of California and Nevada, which were then approved by the Congress and signed into law by President Carter on December 19, 1980. See P.L. 96-551, 94 Stat. 3233; California Government Code Section 66801; Nevada Revised Statute 277.200. Unless otherwise indicated all references to the Compact are to the 1980 amended Compact.

permanent the nearly identical provisions contained in the predecessor interim ordinance 81-5 adopted by the TRPA Governing Body on June 25, 1981. Combined, those measures directly and specifically prohibited any reasonable, practical, viable, beneficial, or feasible use of thousands of legally-created lots or parcels of privately-owned real property in the Lake Tahoe Basin, and specifically precluded the construction of single-family homes on, or any other reasonable use of, the lots or parcels owned by those Plaintiffs who are parties to this action (named Plaintiffs). **Further, as alleged more fully hereinbelow, while the 1984 Regional Plan was subsequently superseded by TRPA's adoption of a revised 1987 Regional Plan for the Lake Tahoe Basin which became effective on June 1, 1987 ("the 1987 Regional Plan"), that 1987 Regional Plan continued in effect for an additional lengthy period of time, and in the case of certain named Plaintiffs until the present, the same complained-of regulatory prohibitions made applicable to the named Plaintiffs' properties by the 1984 Regional Plan and the predecessor interim ordinance 81-5, all as more specifically alleged hereinafter.** This action is brought by the Plaintiff TAHOE-SIERRA PRESERVATION COUNCIL, INC. (hereafter "PRESERVATION COUNCIL"), a non-profit membership organization whose principal purpose is to represent the interests of Lake Tahoe area property owners who are its members, and by the 294 individually-named Plaintiffs, each of whom is the owner of real property located within the Lake Tahoe Basin subject to the prohibitions and restrictions contained in the Regional Plan complained of herein. Specifically, this

action seeks **just compensation** and/or monetary relief based on the following claims:

A. ***FIRST (Formerly SECOND) CLAIM FOR RELIEF*: Stream Environment Zone** ("SEZ") properties – Damages for Violation of Fifth and Fourteenth Amendment Protections Against Taking Private Property Without Just Compensation.

B. ***SECOND (Formerly FIFTH) CLAIM FOR RELIEF***: Class 1, 2, and/or 3 Properties – Damages for Violation of Fifth and Fourteenth Amendment Protections Against Taking Private Property Without Just Compensation.

C. ***THIRD (Formerly SEVENTH) CLAIM FOR RELIEF***: Violation of the Federal Civil Rights Act (42 U.S.C. 1983 and 1985).

IV. PARTIES

4. Plaintiff PRESERVATION COUNCIL is a California non-profit public corporation, in good standing, incorporated on January 16, 1981, under the laws of the State of California, and has its principal office in the State of California. The PRESERVATION COUNCIL is a membership organization representing approximately 2,000 dues-paying members who own private real property, both improved and unimproved, located in the Lake Tahoe Basin, which real properties are subject to the planning and regulatory jurisdiction of Defendant TRPA*.

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* Article II (a) of the Compact defines the precise geographical boundaries of the "region" subject to the

The principal purpose of the PRESERVATION COUNCIL is to serve and actively represent the interests of its members, individually and collectively, before the Defendant TRPA and other legislative bodies and regulatory agencies in connection with its members' use and enjoyment of their private properties located in the Lake Tahoe Basin, and to ensure the rights and interests of its members are fully represented and protected insofar as possible. All of PRESERVATION COUNCILS' members owning real property in the Lake Tahoe Basin have a direct interest in the planning and regulatory activities of TRPA, and particularly in the specific provisions of the **1984** Regional Plan complained of herein which directly and specifically prohibited any reasonable or practical use of certain private real property as more fully set forth hereafter. Among its members are each of the named Plaintiffs joining in this action, each of whom own legally-created lots or parcels of real property located within the Lake Tahoe Basin, which properties are located in areas either identified by the **1984** Regional Plan as a so-called Stream Environment Zone ("SEZ") or in a so-called Land Capability Class 1, 2, and/or 3 area, and therefore are subject to the permanent prohibitions and restrictions imposed by the Defendant TRPA set forth in its **1984** Regional Plan, **its predecessor interim ordinance 81-5, and which were continued in full force and effect even after adoption of its revised 1987 Regional Plan, all as described more fully hereafter.** Additionally, the PRESERVATION COUNCIL members include numerous

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jurisdiction of the TRPA. For purposes of this Complaint, that region is commonly identified herein as the "Lake Tahoe Basin".

others who also own properties in the Lake Tahoe Basin subject to the prohibitions on use of SEZ or Class 1, 2, and/or 3 properties imposed by the Defendant TRPA which are the subject of this action. The PRESERVATION COUNCIL, through its authorized representatives, actively participated in the entire TRPA regional planning process leading to the adoption of the **1984** Regional Plan at issue in this action, and attended and expressed its views and concerns, orally and in writing, at each public hearing held by the Defendant TRPA in connection with the consideration of the **1984** Regional Plan at issue herein, **as well as in connection with the adoption of Ordinance 81-5 and the revised 1987 Regional Plan addressed herein**. The PRESERVATION COUNCIL, and its members who own real property within the Lake Tahoe Basin and who have made substantial financial investments in their property, are directly and vitally interested in the protection and the preservation of the unique environmental and scenic resources of the Lake Tahoe Basin, and firmly believe that **that** protection and preservation can be achieved in a manner consistent with the protections guaranteed by the United States Constitution and other applicable laws (thus the name PRESERVATION COUNCIL). The PRESERVATION COUNCIL therefore brings this action as a matter of public right to compel Defendants, and each of them, to perform their public duties and responsibilities in a manner that is fully consistent with their statutory and Constitutional obligations.

5. Each of the named Plaintiffs listed in Appendices I and II* hereto are owners of one or more lawfully-created, vacant or undeveloped lots or parcels of real property located in the State of California within the jurisdiction of the Defendant TRPA, which lots or parcels **were** subject to the specific and direct prohibitions on any reasonable, practical, beneficial, feasible, or viable use set forth in the **1984** Regional Plan, **and the predecessor interim ordinance 81-5 and successor 1987 Regional Plan**, due to the fact they appeared to be substantially in areas identified as so-called "Stream Environment Zone". Additional relevant factual allegations regarding each of such Plaintiffs, and the real property of each Plaintiff at issue, are set forth in Appendices I and II hereto, applicable to Plaintiffs owning SEZ properties within the Counties of Placer and El Dorado respectively, State of California, which Appendices are incorporated herein as if set forth here in full.

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* In order to provide for a more orderly pleading, all of the detailed allegations specifically regarding the property and interests of each individual Plaintiff are set forth in separate Appendices, grouped by geographical jurisdiction and category of property involved, which Appendices are identified by an appropriate designation: Appendix I – Plaintiffs Owning SEZ Properties located in Placer County; Appendix II – Plaintiffs Owning SEZ properties in El Dorado County; Appendix III – Plaintiffs owning Class 1, 2, and/or 3 Properties Located in Placer County; and Appendix IV – Plaintiffs Owning Class 1, 2, and/or 3 Properties Located in El Dorado County. **The Appendices, which have been amended to bring them current as of the time of filing this First Amended Complaint, also allege with specificity the period and related circumstances of the taking alleged to have occurred as to each Plaintiff's property.**

6. Each of the named Plaintiffs listed in Appendices III and IV hereto are the owners of one or more lawfully-created, vacant or undeveloped lots or parcels of real property located in the State of California within the jurisdiction of the Defendant TRPA, which lots or parcels **were** subject to the specific and direct prohibitions contained in the **1984** Regional Plan, **and the predecessor interim ordinance 81-5 and successor 1987 Regional Plan**, precluding any reasonable, practical, beneficial, feasible, or viable use by virtue of their designation and restrictions imposed in the Regional Plans, and accompanying Plan Maps, as being substantially in an area identified as a Land Capability District 1, 2, and/or 3. Additional relevant factual allegations regarding each of such Plaintiffs, and the specific real property of each Plaintiff at issue, is more particularly set forth in Appendices III and IV hereto, applicable to Plaintiffs owning properties in areas identified as within a Land Capability Class 1, 2, and/or 3 area within the Counties of Placer and El Dorado respectively, State of California, which Appendices are incorporated herein as if set forth here in full.

7. Defendant TRPA is a separate legal entity created by the interstate Compact between the States of California and Nevada (see Compact, Article III (a)). Defendant TRPA is under the direction of a Governing Body consisting of 14 voting members (and one non-voting representative appointed by the President pursuant to Sec. 3 of P.L. 96-551), and is otherwise subject to and directed by the provisions of the Compact. Defendant TRPA, acting through the required affirmative vote of the Defendant members of its Governing Body, duly adopted the **1984**

Regional Plan, **and the predecessor interim Ordinance 81-5 and successor 1987 Regional Plan**, and the **pertinent** policies **or provisions included** therein, prohibiting any reasonable use of Plaintiffs' private real properties.

8. Defendant State of California and Defendant State of Nevada are the parties to the bi-state Compact, a contract between the two States. Each State adopted identical legislation creating the bi-state TRPA, including the 1980 amendments to the Compact. Each State has delegated, transferred, or conferred a part of its sovereign powers to the TRPA and invested the TRPA with the police powers it purports to exercise in adopting those portions of its Regional Plan at issue herein. Each State appointed or designated four "State representatives" to serve on its respective 7-member delegation*. The

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* Article III(a) of the Compact provides for the following representation on the 7-member delegations to the TRPA Governing Body from each state:

California: 2 members appointed by the Governor; 1 member appointed by the Speaker of the Assembly; 1 member appointed by the Senate Rules Committee (all of the foregoing "shall represent the public at large within the State of California"; 1 member appointed by each of the Boards of Supervisors of Placer and El Dorado Counties; and 1 member appointed by the City Council of the City of South Lake Tahoe.

Nevada: 1 member appointed by the Governor; the Secretary of State or his designee; the Director of the State Department of Conservation and Natural Resource (all of the foregoing "represent the public at large within the State of Nevada"); 1 member appointed by each of the County Commissioners of Douglas and Washoe Counties; 1 member appointed by the Board of Supervisors of Carson City; and a seventh member appointed by the six other members, or by the Governor (as is the case with the current appointee), in the event the other six cannot agree on the seventh.

appointed representatives of each State directly participated in the deliberations and votes approving those portions of the **1984** Regional Plan **and other regulatory measures** at issue herein. Each State has accepted the obligation to provide funding for the operation and activities of the Defendant TRPA as provided in Article VII(A) of the Compact. Further, each Defendant State independently enacted legislation and/or related mandates requiring the collection and export of all sewage waste from the Lake Tahoe Basin, and requiring the construction of major sewer treatment facilities and sewer collection and transport systems, which were constructed and funded under the applicable requirements and laws of each State, in part by assessments levied against all affected private properties including the properties of the named Plaintiffs. Each State is now a party to those actions by the Defendant TRPA which deny and deprive the named Plaintiffs of the benefits from the improvements for which they have been assessed and paid, all as more specifically complained of hereafter.

V. FACTUAL BACKGROUND

9. The Lake Tahoe "region" ("Lake Tahoe Basin") is that area defined in Article II (A) of the Compact. It lies within the boundaries of the States of California and Nevada, and is within the geographical boundaries of the following local government jurisdictions – Placer County, California; El Dorado County, California; Washoe County, Nevada; the unincorporated portion of Carson City, Nevada; and Douglas County, Nevada. The City of South Lake Tahoe lying within the El Dorado County portion of the Basin is the only incorporated city in the region. Both

Defendant States, and the aforementioned local governments, pursuant to applicable state laws and local ordinances, exercise land use regulatory jurisdiction within their respective areas and have adopted general planning and/or zoning requirements for their respective portions of the Lake Tahoe Basin as well as statutory procedures for the division of land into lots or parcels. Further, **as of the date of filing this action**, approximately 66% of the land area of the Lake Tahoe Basin **was** within the ownership of the United States government, managed by the United States Forest Service. A total of approximately 72% of the Lake Tahoe Basin **(as of the date of filing this action) was** publicly owned, either by the Forest Service or other federal agencies, by the Defendant States, or by local government jurisdictions. Approximately 28% of the land areas of the Lake Tahoe Basin are currently in private ownership, and approximately 15% of the Lake Tahoe Basin is considered to be "urbanized".

10. Commencing in the late 1800's, in response to demands from families and individuals seeking summer homesites in the Lake Tahoe Basin, the first single-family home subdivisions were "platted" and lot sales commenced, mostly along the California shoreline of Lake Tahoe. By World War II, a large number of single-family lots had been created, mostly on the California side of the Basin, but with some on the Nevada side of the Lake Tahoe Basin. Following World War II, there was a marked increase in the urbanization of the Lake Tahoe Basin as a result of major population increases in the western United States and the desire for vacation homesites and permanent residences in the Lake Tahoe Basin. Commencing in the early 1950s and extending well into the

1970s, in response to the increased population demands and growth in the western United States, public policy of the federal, state and local governments permitted and authorized, and even encouraged, the creation of single-family residential homesites, mostly in single-family subdivisions, in the Lake Tahoe Basin. Taken as a whole, the activities and policies of the federal, state and local governments have encouraged, authorized, and approved the creation and sale of thousands of private parcels and lots, primarily as single-family homesites, within the Lake Tahoe Basin, including specifically those lots or parcels owned by the named Plaintiffs as alleged herein.

11. In the late 1960s, after extensive consideration, debate, and negotiations, the States of California and Nevada each adopted the necessary enabling legislation to create the initial TAHOE REGIONAL PLANNING AGENCY, which **bi-state compact**, after Congressional approval, was signed by President Richard Nixon on December 18, 1969. (P.L. 91-148, 83 Stat. 360; California Government Code Section 66801; and N.R.S. 277.200).

12. Pursuant to the initial Compact, the TRPA's **original** Governing Body of 10 members was created and mandated to adopt a Regional Plan for the Tahoe Basin within 18 months after formation of the Agency. After the initial adoption of an interim Plan, the Governing Body undertook a detailed study of the Lake Tahoe Basin, and after extensive debate and discussions, finally adopted a new Regional Plan in December 1971 (**the "1971 Regional Plan"**). Thereafter, during 1972, the TRPA Governing Body adopted a number of ordinances implementing the Plan, including it [sic] Land Use Ordinance (Ordinance No. 4) adopted February 10, 1972. Pursuant to that 1971

Regional Plan and 1972 Land Use Ordinance, the entire Basin was overlaid with a new set of land use districts or zoning which substantially downzoned the Basin from the theoretical capacity then permitted under local government plans and ordinances.

13. The 1972 Land Use Ordinance and 1971 Regional Plan specifically recognized the legitimacy of existing, lawfully created single-family lots. Thus, Section 9.13 of the 1972 Land Use Ordinance provided:

> "One (1) single-family house may be constructed on any existing legal lot or parcel of record as of February 10, 1972, that is located in any district except Tourist Commercial or General Commercial, provided, however, that this section shall not, apply to lots in residential subdivisions where the final map of such subdivision was approved and filed for record more than five (5) years prior to February 10, 1972, and there has been no constructions of roads, sewers or other substantial facilities serving the subdivision, or the posting of performance bonds assuring such construction, prior to February 10, 1972."

Additionally, pursuant to said 1971 Regional Plan and 1972 Land Use Ordinance, as well as its Subdivision Ordinance (Ordinance No. 7) adopted on March 22, 1972, the Defendant TRPA established a process to review and approve additional new subdivision proposals intended to create additional single-family lots and parcels, and thereafter continued until December, 1980 to accept applications and process and approve proposals for new single-family subdivisions within the Lake Tahoe Basin,

thereby authorizing the creation of additional single-family lots or parcels.

14. Commencing in 1969, the United States Forest Service and the Defendant TRPA cooperated in a joint environmental land-use planning study of the Lake Tahoe Basin. During 1971, the Forest Service, in cooperation with the Defendant TRPA, completed a reconnaissance-level land capability study of the Lake Tahoe Basin. Soil and geomorphic information was compiled on maps at a scale of 2 inches to the mile, from which a Land Capability Map was prepared for the Basin which was subsequently utilized in the 1971, TRPA Regional Plan. Additionally, a detailed report, entitled "Land Capability Classification of the Lake Tahoe Basin, California-Nevada, A Planning Guide", was written and prepared by Robert G. Bailey, an employee of the Forest Service, **and others**, which report was issued in 1974 (the so-called "Bailey Report"). Pursuant to that joint land capability study, all lands within the Tahoe Basin were divided into seven principal categories, or Land Capability Classes, distinguished according to the theoretical risk of erosion or disturbance hazards. Class 1 areas include those areas that have the highest theoretical risk of runoff or erosion due primarily to soil types and steeper slopes, **while** Class 7 areas are those where the existence of such conditions is theoretically negligible. Additionally, the "Bailey Report" and **Bailey** Land Capability Map recommended that, for planning purposes, area-wide limits be placed on "allowable impervious cover" (man-made coverage such as footprints of houses and buildings, driveways, highways and roads, and other similar impervious coverage) ranging from 1% allowable coverage in Class 1 areas up

to 30% in Class 6 and 7 areas. The land capability criteria were incorporated in the Defendant TRPA's 1971 Regional Plan and 1972 Land Use ordinance with additional requirements **that** expressly permitted the construction of single-family homes on lots and parcels identified in all land capability areas, subject to certain limits and other regulations contained in the Plan and implementing ordinances.

15. In 1978, the Defendant TRPA approved its "Lake Tahoe Basin Water Quality Management Plan" (hereafter the "1978 Water Quality Management Plan") pursuant to Section 208 of the Federal Clean Water Act (P.L. 92-500), which 1978 Water Quality Management Plan became the water quality element of TRPA's Regional Plan. The 1978 Water Quality Management Plan set forth programs for waste management, surface water runoff management, erosion control, and a program for implementation. Also, for the first time, it identified and delineated areas known as Stream Environment Zones (SEZs). The Plan described a Stream Environment Zone as:

> "*Stream Environment Zone* – That region: 1) which surrounds a stream, including major streams, minor streams and drainageways, which owes it [sic] biological and physical characteristics to the presence of water; 2) which may be inundated by a stream; or 3) in which actions or man or nature may directly or indirectly affect the stream. A stream includes small lakes, ponds, and marshy areas through which the stream flows." (1978 TRPA Water Quality Management Plan, Vol. II, p. III-2

The SEZs were the [sic] delineated on the 1" = 400' scale land use/land capability maps of the Defendant TRPA

using the procedures found in the 1978 Water Quality Management Plan (Page VI-13 through 15 of Volume I, and Pages III-2 through 6 of Volume II). The mapping also included a buffer strip on either side of stream channels ranging in width from 25 feet to 100 feet, depending on the order or magnitude of the stream. The 1978 Water Quality management Plan also set forth construction requirements in Volume II *Handbook of Best Management Practices* ("BMPs) for all construction occurring within an identified SEZ, which requirements were intended to minimize or avoid the potential adverse impacts of construction within Stream Environment Zones. Those BMPs provided in part that where a parcel or lot was substantially with the boundaries of a SEZ zone, then any new construction would be permitted only if it was sited on the best available site on the property taking into consideration drainage, access, soil type, vegetation, hydrological characteristics, elevation, topography, and distance from the natural channel. Accordingly, the 1978 Water Quality Management Plan continued to permit the reasonable use of the parcels or lots owned by those named Plaintiffs as being in SEZ areas, provided construction of new homes on those SEZ lots took place in strict accordance with the requirements, including the BMPs, set forth in the 1978 Water Quality Management Plan.

16. As of December 19, 1980, the effective date of the amended Compact, the named Plaintiffs, and each of them, were the owners of one or more legally-created lots or parcels of record of real property within the Lake Tahoe Region, as more specifically described and set forth in Appendices I through IV to this Complaint. Each of

such lots or parcels owned by named Plaintiffs was legally created, approved, and sold to named Plaintiffs, or their predecessors in interest, pursuant to the legal requirements of the Defendant State of California, and the applicable local government and/or TRPA requirements for the creation of such lots or parcels. The zoning and other land-use requirements of each of the affected local government agencies having jurisdiction over said properties authorized, and continue today to authorize, the named Plaintiffs to construct a single-family home on each parcel of record or make other reasonable use thereof. Additionally, as set forth above, the lawfully-adopted Regional Plan and ordinances of the Defendant TRPA in force and effect on December 19, 1980, including the 1978 Water Quality Management Plan described above and the ordinances, rules and regulations adopted thereunder, authorized the construction of at least one single-family home on each of the parcels or lots owned by the named Plaintiffs. Further, nearly all of the parcels or lots owned by the named Plaintiffs are located in existing single-family neighborhoods or subdivisions which are today partially built-out with other single-family homes (ranging from 20% to 90% built-out). Nearly all of those single-family subdivisions are currently served by paved roads, water systems, and sewage collection and treatment facilities, as well as electrical power, telephone service, and other necessary utilities. As set forth with greater specificity in Appendices I through IV hereto, Plaintiffs, and their predecessors in interest, as the owners of said real properties, have been obligated to pay those assessments and special taxes assessed against their respective properties in partial

payment for the sewer systems, water systems, roads and other improvements designed and intended to serve homes and other structures to be built upon their properties. Further, each of the named Plaintiffs, in purchasing their property and in continuing to make substantial payments in the way of property taxes and bond assessments **for public improvements**, have done so in reliance on the fact that their lots or parcels were legally-created and zoned for the purposes set forth with greater specificity in Appendices I through IV, primarily for the purpose of ultimately constructing a single-family home to serve as a permanent, retirement or vacation residence. Further, Plaintiffs have relied in good faith, and now to their detriment, upon the actions of the Defendant States and the Defendant TRPA in purchasing their properties, with the understanding that until at least December 19, 1980, their properties were considered to be lawfully-created lots or parcels upon which Plaintiffs, provided they complied with all reasonable requirements for building and construction, could proceed to make a reasonable use by building thereon a home or other structure at a time of their choosing.

VI. 1980 AMENDED COMPACT, INTERIM ORDINANCE NO. 81-5, AND 1984 REGIONAL PLAN AND PROHIBITIONS ON USE OF PLAINTIFFS' PROPERTIES*

17. In the late 1970s, because of concerns about alleged weaknesses in the initial TRPA Compact,

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* True and correct copies of the Regional Plans and ordinances referred to in this First Amended Complaint will be submitted in evidence, or lodged with the Court, in a timely manner when this matter is set for hearing.

legislators from the States of California and Nevada met in private to negotiate amendments to the initial Compact. Those amendments were subsequently adopted by the Nevada Legislature at a special session of that Legislature held in September, 1980, and signed by its Governor, and thereafter adopted by the California Legislature and signed by its Governor. The legislation was then ratified by the Unites [sic] States Congress (with minor amendments added in Sections 2 through 5 of P.L. 96-551) and approved by President Carter on December 19, 1980, at which time the amended Compact became effective. The amended Compact dramatically changed the makeup, functions, and duties of the Defendant TRPA and its Governing Body, including among numerous others the following: an increase in the composition of the Governing Body from 10 to 14 voting members; changes in the Governing Body's voting procedures for taking actions upon certain matters as set forth in Article III(g) of the Compact, including the requirement that at least 4 members of each State's delegation (a total of at least 8) act to approve the environmental threshold carrying capacities and Regional Plan amendments described hereafter; changes in the project review procedures (Articles III(g)(2), V(g) and VI(b)); and the addition of a new Article VII requiring preparation of Environmental Impact Statements for certain project. The amended Compact also required that the Defendant TRPA, acting through its Governing Body, do the following:

(a) Within 18 months after the effective date of the amendments to the Compact, the Defendant TRPA was required to adopt "environmental threshold carrying capacities" for the region; and

(b) Within one year after the adoption of the environmental threshold carrying capacities, TRPA "shall amend the regional plan (the 1971 Regional Plan) so that, at a minimum, the plan and all of its elements, as implemented through agency ordinances, rules and regulations, achieves and maintains the adopted environmental threshold carrying capacities." (Article V(b) and (c))

Article V(c) of the Compact then sets forth at length and with specificity the nature and content of the required amendments to the Regional Plan.

18. Pursuant to the provisions of Article VI(a) of the Compact, Defendant TRPA was required to adopt "all necessary ordinances, rules, and regulations to effectuate the adopted regional plan". Pursuant to Article VI(b), "No project (defined in Article II(h)) . . . may be developed in the region without obtaining the review and approval of the agency and no project may be approved unless it is found to comply with the regional plan and with the ordinances, rules and regulations enacted pursuant to subdivision (a) to effectuate that plan".

19. Pursuant to Article VI(c) of the Compact, a "limited moratorium" was also placed into effect, commencing December 19, 1980, to last during the 30-month planning period in order to "halt temporarily works of development in the region which might otherwise absorb the entire capability of the region for further development or direct it out of harmony with the ultimate plan". That moratorium placed numerical limits on the number of building permits which could be authorized for new

residential units or commercial projects, temporarily prohibited new subdivisions, planned unit developments, or condominium projects that had not previously received a complete tentative map, and imposed other limitations on public works, casinos, and other development "until the regional plan is amended pursuant to subdivision (c) of Article V, or until May 1, 1982, whichever is earlier."

20. In addition to the interim moratorium imposed by Article VI(c) of the Compact, the TRPA Governing Body, acting on its own initiative, shortly after being reconstituted by the amended Compact, proceeded to consider and adopt amendments to its 1978 Water Quality Management Plan, allegedly to meet a mandate of the State of California and the United States Environmental Protection Agency, which amendments were adopted by way of TRPA's Ordinance 81-5 which was passed and adopted by the Defendant TRPA on June 25, 1981. Pursuant to the applicable provisions of Ordinance No. 81-5, the following interim prohibitions were placed into effect:

A. An interim prohibition was placed upon any construction, use or activity on lands within Land Capability Districts 1, 2, or 3, with a very limited exception **applicable *only*** on the Nevada side of the Basin permitting approval of construction of some single-family homes on Class 1, 2, and/or 3 lots pursuant to a "case-by-case system" set forth in the Ordinance (**no such exception was applicable to california-side properties**), and with the exception of certain residential remodeling and reconstruction, public works projects, outdoor recreation facilities, and other specific exceptions set forth in Sections 2.00 of the Ordinance.

B. As to SEZ lands, Ordinance 81-5 also implemented a Basin-wide "interim prohibition" on any construction, work, use or activity upon lots or parcels substantially within areas identified as a SEZ, with certain limited exceptions for public works projects, man-modified areas, and approved erosion control work. The interim prohibition on construction on lots or parcels within SEZs expired on April 26, 1984, upon the adoption of the amendments to the 1984 Regional Plan, at which time it was replaced by the permanent prohibitions and restrictions described hereafter.

In summary, **by the adoption of its Ordinance 81-5,** an interim moratorium was imposed by the Defendant TRPA, commencing on June 26, 1981, and continuing until April 26, 1984, which prohibited construction of single-family homes, other buildings, **or any other viable use** of the lots or parcels of record owned by named Plaintiffs **found by TRPA to be** in Stream Environment Zone areas, or in Land Capability Districts 1, 2, and/or 3. The interim moratorium **was** replaced **by the 1984 Regional Plan containing** an even more severe, *permanent,* Basin-wide prohibition that precluded any reasonable or practical use whatsoever of named Plaintiffs' properties, all as more particularly alleged hereafter. **Further, as alleged more fully below, that permanent prohibition established by the 1984 Regional Plan was continued in effect by the pertinent provisions of the successor 1987 Regional Plan, which 1987 Plan superseded the 1984 Regional Plan as of June 1, 1987.**

21. On August 26, 1982, acting pursuant to its Resolution No. 82-11, the Governing Body of the Defendant

TRPA adopted the "environmental threshold carrying capacities" provided for in Article V(b) of the Compact.

22. On August 26, 1983, due to the failure of the Defendant TRPA's Governing Body to adopt its amended Regional Plan within the one year required after adoption of the environmental threshold carrying capacities, and allegedly because it could not make the requisite project-approval findings set forth in Article V(g) of the Compact, the Defendant TRPA imposed by resolution still another moratorium prohibiting its staff from accepting or processing any additional applications for projects, including single-family home construction or other reasonable uses on Plaintiffs' properties, which additional moratorium extended by its terms until April 26, 1984, the date of adoption of the amended Regional Plan (**the so-called "8-month moratorium"**).

23. On March 29, 1984, the Defendant TRPA Governing Body finally approved on first reading, nearly one year after the Compact's deadline, the amendments to its **1984** Regional Plan at issue herein by approving its ordinance No. 84-1. On April 26, 1984, the Governing Body adopted its Ordinance No. 84-1 on second reading, thereby approving said amendments to its Regional Plan which became effective that date.* The **1984** Regional

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* The Regional Plan amendments were originally adopted on the key "first reading" by the Defendant TRPA Governing Body by a 9-3 vote of its members, a bare one vote majority **over the required four votes from each state** (2 members absent). On the perfunctory "second reading", it was confirmed in a show of unity by a 13-0 vote (1 member absent). Pursuant to Article VI(a), the Ordinance approving the amendments to the Regional

Plan consisted of a number of documents and maps, all as more specifically listed and identified in Section 2.00 of Ordinance No. 84-1. Additionally, the 1984 Regional Plan included a number of Plan Maps and overlays, also adopted by Ordinance No. 84-1, including "Land Capability Overlays" (applicable copies of TRPA's Plan Maps showing the lots or parcels of the named Plaintiffs are included as part of the Appendices hereto). Said Plan Maps depicted the boundaries of Class 1, 2, and 3 areas, and SEZ boundaries (shown as "lb" areas), subject to the caveat contained in Section 2.14 of Ordinance 84-1, and depicted each lot or parcel owned by the named Plaintiffs at issue in this action.

24. The EIS for the 1984 Regional Plan prepared and approved by the Defendant-TRPA and other supporting documentation for the amendments to the 1984 Regional Plan identified approximately 19,300 vacant, lawfully-created, single-family lots or parcels that existed as of the effective date of adoption of the 1984 Regional Plan within the Lake Tahoe Basin, the great majority of which are located in partially built-out, fully approved and developed, single-family subdivisions served by roads, sewers, water, and other utilities. The 1984 Regional Plan continued to recognize such subdivisions as appropriate and proper locations for single-family residences and neighborhoods. Of those remaining vacant, lawfully-created, existing single-family lots or parcels of record, based upon the computerized data base of the Defendant TRPA it was estimated that there were approximately

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Plan became effective on April 26, 1984 when passed on second reading.

6,400 lots or parcels partially or wholly in areas identified on the Plan Maps as in Land Capability Districts 1, 2, or 3, and approximately 4,900 lots or parcels partially or wholly in areas identified as SEZ areas. Of the foregoing lots and parcels, approximately 5,650 were shown to be substantially (50% or more) within Land Capability Districts 1, 2, and/or 3, and 3,500 were shown to be substantially (50% or more) within SEZ areas (a total of 9,150 lots or parcels or 47% of the then remaining 19,300 vacant lots or parcels). The lots or parcels owned by each named Plaintiff were depicted on the Regional Plan Maps adopted as part of the 1984 Regional Plan by the Agency, and identified in the computerized data base of the Defendant TRPA, as being within either a Class 1, 2, and/or 3 Land Capabilty area, or within an area identified as a SEZ (lb area) on the TRPA Land Capability Maps, so as to be subject to the prohibitions in the 1984 Regional Plan which are at issue.

25. As to all legally-created lots or parcels of record located in so-called SEZ areas, including those specific lots or parcels owned by those named Plaintiffs identified in Paragraph 5 above and more specifically described and alleged in Appendices I and II hereto, the 1984 Regional Plan directly and specifically imposed a total and permanent prohibition on the further use or development of those parcels or lots as single-family homesites, or for any other practical or viable use, through the adoption of the following specific goals and policies set forth in the "Conservation Element" of Part I of the 1984 Regional Plan, pp. 99-102:

"GOAL #1 PROVIDE OR THE LONG-TERM PRESERVATION AND RESTORATION OF STREAM ENVIRONMENT ZONES

"The value of SEZs crosses many interests and their preservation is a means for achieving numerous environmental thresholds. Policies that promote their maintenance, protection, and restoration are listed below.

* * *

"POLICIES

* * *

"2. SEZ LANDS SHALL BE PROTECTED AND MANAGED FOR THEIR NATURAL VALUES

"SEZ lands and associated riparian vegetation are scare in the Basin relative to other plant communities. Because SEZs provide many beneficial functions (especially pertaining to water quality) *only forest management practices, stream improvement programs, and habitat restoration projects are permissible uses.**

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* The-three permitted "uses" are, for all practical purposes, public type environmental projects of no practical use or value to the owners of private property. "Forest management practices" includes only limited thinning of dead, diseased, or old trees, but does not permit commercial timer harvesting, nor is such timber harvesting a practical use of Plaintiff's properties which are typically located in residential subdivisions and are much too small to have any commercial timber resources or potential.

* * *

"5. NEW DEVELOPMENT SHALL BE SITED OUTSIDE OF STREAM ENVIRONMENT ZONES

"To prevent further loss of naturally-functioning stream environment zones, no new development shall be permitted in stream environment zones except (1) public works projects which satisfy the conditions set forth in policies 6 and 7; (2) man-modified stream environment zones which satisfy the conditions set forth in policy 8; (3) replacement of existing coverage in conformance with policy 9; and (4) where such encroachment into stream environment zones provides the only feasible access to buildable private property for which all necessary building permits have been obtained and stream environment zone lands are restored in the amount of 1.5 times the area of stream environment zone which is disturbed or developed by the project. Site-by-site inspection shall be made for all project proposals in or near stream environment zones.

"10. DEVELOPMENT SHALL BE SET BACK FROM THE EDGE OF RIPARIAN VEGETATION

"A buffer strip outside of riparian vegetation will help protect the vegetation from disturbance. The edge between riparian zones and adjacent plant communities also is critical to the needs of many wildlife species. The TRPA shall establish standards providing for a significant

buffer around riparian vegetation contiguous to streams or other water bodies and providing for a smaller buffer or preservation policy for non-contiguous riparian vegetation." (Emphasis added.)

26. The foregoing restrictions **were** included in the **1984** Regional Plan (**and similar provisions in the 1987 Regional Plan**) allegedly to preserve and protect certain environmental resources, and thus **were intended** for the public's benefit. The practical effect of these provisions **was** to totally prohibit any new development or reasonable use of legally-created lots or parcels found to lie substantially in areas identified as so-called Stream Environment Zones. According to the **1984** Regional Plan, including the Regional Plan EIS, maps, and TRPA's computerized data base, there **were** approximately 2,900 acres in urbanized areas mapped as SEZ, and 3,500 vacant, privately-owned lots or parcels of record substantially (50% or more of the lot or parcel) within areas identified as a SEZ, including the lots or parcels owned by those named Plaintiffs identified in Paragraph 5 above, as more fully alleged in Appendices I and II hereto.

27. By virtue of the prohibitions and restrictions set forth in the **1984** Regional Plan, as alleged in Paragraph **25** above, which Defendant TRPA is mandated to enforce by the Compact, and combined with the similar prohibitions and restrictions set forth in **the predecessor interim** Ordinance No. 81-5 as alleged above, **and the comparable provisions of the successor 1987 Regional Plan as alleged below**, those named Plaintiffs identified in Paragraph 5 **(SEZ Plaintiffs) were** deprived of the entire

practical, substantial, viable, beneficial, reasonable, economic and feasible use of their properties **for the period of time specified in the pertinent Appendix applicable to each affected named Plaintiff's property**, there being no other lawful or authorized practical or reasonable use to which such properties **could** be put. Each parcel or lot owned by each named Plaintiffs has unique characteristics, including the extent of on-site damage or disturbance already existing, the distance to a watercourse, the potential for stream degradation or man-caused erosion, the extent and type of existing vegetation, and the nature of the so-called stream or watercourse. Nevertheless, the prohibitions set forth in the **1984** Regional Plan provided no meaningful exceptions, alternatives, or variance procedures **to be pursued by the named** Plaintiffs **owning lots in or containing an SEZ**, nor any means of hearing or review to pursue or exhaust to determine whether or not a proposal to build would otherwise meet the environmental goals, policies, or environmental threshold carrying capacities adopted by TRPA. Instead, the only remedy available to Plaintiffs **was** to challenge whether or not their properties **were** in fact correctly identified **by TRPA** as being substantially within a so-called Stream Environment Zone, in which case the **1984** Regional Plan imposed a irrebuttable presumption **that** prohibited any building or development of a single-family home or other structure on said properties. **Named Plaintiffs further chose not to attempt to challenge the correctness of TRPA's SEZ classifications prior to initiating this action, acknowledging that TRPA had undertaken extensive studies at great expense resulting in TRPA's SEZ classifications, and it was therefore neither likely**

that designation was in error, nor was it reasonable to place the burden on the named Plaintiffs to demonstrate that TRPA was in error in its own classifications.

28. As to all those legally-created vacant lots or parcels of record lying within so-called Land Capability Districts 1, 2, and/or 3 (a total of approximately 6,400, with approximately 5,650 situated 50% or more in said Districts 1, 2, and/or 3), including those lots or parcels owned by the named Plaintiffs identified in Paragraph 6 above and as specifically alleged in Appendices III and IV hereto, the **1984** Regional Plan directly and specifically imposed a total and permanent prohibition on the further use or development of said lots or parcels as single-family homesites, or for any other practical and viable use, **except** a very minimal exception that theoretically would **have** permited up to approximately 5% of the affected **Class 1, 2, and 3** properties in the entire Lake Tahoe Basin to qualify for the right to construct a single-family homebut which **was never implemented by TRPA**. Said permanent construction prohibition and restrictions **were** set forth in the "Soils Sub-Element" of the "Conservation Element of the Plan, Goal 1, Policy 1, pages 88-90 of the Plan, which read in pertinent part:

"POLICIES

"1. NO NEW RESIDENTIAL, TOURIST, PUBLIC SERVICE, RECREATION OR COMMERCIAL DEVELOPMENT SHALL BE PERMITTED ON LAND CAPABILITY DISTRICTS 1-3 EXCEPT AS NOTED IN THE FOLLOWING POLICY.

"Development of environmentally sensitive lands in capability classes 1, 2, and 3 will not be

permitted except as specified below. New development for purposes of this policy is development that creates additional land coverage. During this period (sic), TRPA will conduct a thorough evaluation of the environmental consequences of development in these areas, and of the options available to land owners, before deciding what policies should apply during later phases of the plan implementation. (Emphasis added.)

"A. TRPA SHALL ESTABLISH A SINGLE-FAMILY RESIDENCE EVALUATION SYSTEM OR POINT PRIORITY SYSTEM, ON OR BEFORE JANUARY 1, 1985 (GOAL #1, POLICY #2, DEVELOPMENT AND IMPLEMENTATION SUBELEMENT). ON AUGUST 1, 1985, APPLICATIONS FOR SINGLE-FAMILY DWELLINGS IN LAND CAPABILITY LEVEL 3 MAY BE ACCEPTED FOR PROCESSING, UP TO 75 LOTS IN NEVADA AND 25 LOTS IN CALIFORNIA, WHICH MAY BE APPROVED FOR CONSTRUCTION AS OF MAY 1, 1986. ON AUGUST 1, 1986, APPLICATIONS FOR SINGLE-FAMILY DWELLINGS ON LOTS MAPPED IN LAND CAPABILITIES 1-3 MAY BE ACCEPTED FOR PROCESSING, UP TO 75 LOTS IN NEVADA AND 25 IN CALIFORNIA, WHICH MAY BE APPROVED FOR CONSTRUCTION AS OF MAY 1, 1987. THIS SAME PROCEDURE WILL APPLY TO UP TO 75 LOTS IN NEVADA AND 25 LOTS IN CALIFORNIA WHICH MAY BE ACCEPTED ON

AUGUST 1, 1987 AND APPROVED FOR CONSTRUCTION AFTER MAY 1, 1988.

"IF BY JANUARY 1, 1985, NO SINGLE-FAMILY RESIDENCE EVALUATION SYSTEM HAD BEEN ESTABLISHED, AND UPON DEMONSTRATION OF CONSISTENCY WITH THE THRESHOLDS AND WATER QUALITY OBJECTIVES, THE ABOVE PROCEDURE SHALL PROCEED WITH THE STANDARDS SET FORTH IN GOAL #1, POLICY #3, OF THE DEVELOPMENT AND IMPLEMENTATION SUBELEMENT, ENTITLED: 'DEVELOPMENT CRITERIA, MARCH 1982' UNTIL A SINGLE-FAMILY RESIDENCE EVALUATION SYSTEM IS ADOPTED OR UP TO FIVE YEARS FROM ADOPTION OF THE PLAN, AT WHICH TIME THIS PROVISION WILL EXPIRE.

[Note: The foregoing "exception provisions" were never implemented by TRPA.]

Additionally, Policy 4 of Goal 2 of the "Development and Implementation Priorities" sub-element of the Implementation Element, pages 126-127, provided:

> 4. SUBJECT TO THE LIMITATIONS OF GOAL #1, POLICY #1, OF THE SOILS SUBELEMENT, THERE SHALL BE A PROHIBITION OF DEVELOPMENT ON LAND CAPABILITY CLASSES 1-3 EXCEPT THAT NO MORE THAN 100 SINGLE FAMILY UNITS (25 in California and 75 in Nevada) OF THE RESIDENTIAL ALLOCATION RECEIVING A PASSING SCORE UNDER THE EVALUATION SYSTEM FOR ANY YEAR SHALL BE FOR RESIDENTIAL PERMITS OUTSIDE OF AREAS MAPPED AS LAND CAPABILITIES 4-7. (Emphasis added)

"This provision as set forth in the Soils Sub-Element, applies only to calendar years 1986, 1987, and 1988 of the allocation system and would stop unless it is extended by consent of the Board."

[Note: Again the "exception provisions was never implemented by TRPA.]

Further, under the complicated phased priority system established under Goal #1, Policies 1-3 of the foregoing Sub-Element of the Implementation Element (pp. 121-126), only new residential development in areas having the "characteristics of Land Capability Classes 4-7", to be selected with **a future** evaluation system **that was never established by TRPA, were to be** eligible for consideration for building, with all other proposals deferred to an indeterminate time in the future, **but** no earlier than five years after the adoption of the Plan, if at all, with only the vague promise that the Defendant TRPA **would** then review and possibly amend its development prohibitions on Land Capability Class 1, 2, and 3 areas.

29. The foregoing restrictions applicable to Land Capability Class 1, 2, and 3 areas **were** included in the

1984 Regional Plan allegedly to preserve and protect certain environmental resources. The practical effect of these prohibitions **was** to totally prohibit any "new development" on the legally-created lots or parcels owned by the named Plaintiffs identified in Paragraph 6 above, as more fully alleged and set forth in Appendices III and IV hereto.

30. By virtue of **the express** prohibitions set forth in Paragraphs 28 above, which prohibitions and restrictions Defendant TRPA **was** mandated to enforce by the Compact, and combined with the similar prohibitions and restrictions set forth in **predecessor** Ordinance 81-5 **as alleged above and the comparable provisions of the successor 1987 Regional Plan alleged hereinbelow**, those Plaintiffs named in Paragraph 6 **above were** deprived of the entire practical, substantial, viable, beneficial, reasonable, economic and feasible use of their property, there being no other lawful or authorized practical or reasonable use to which such properties could be put, **commencing as of June 25, 1981, the date of adoption of the predecessor interim ordinance 81-5, and continuing for the specific period of time specified in the pertinent Appendix applicable to each named Plaintiff's property.** Further, **those** prohibitions summarily precluded Plaintiffs from receiving, and **took** from them, the benefits for which they **had** been assessed and paid in the sewage collection and disposal systems, water systems, and/or other public improvements built to serve their properties. Further, the alleged exception allowing up to 75 lots in the State of Nevada and 25 lots in the State of California in Land Capability Class 3 areas to be considered during 1985 for possible construction beginning on May 1, 1986,

and an additional 100 lots (75 lots per year in Nevada and 25 lots in California) in Land Capability Classes 1, 2, and 3 during 1987 and 1988 respectively, **even had it been implemented by TRPA which it never was**, offered such a statistically insignificant and *de minimis* chance that named Plaintiffs might qualify to use or build upon their property that it cannot be considered a viable or meaningful exception or variance to such prohibitions. Clearly such an exception gives only the bare appearance of fairness, while in fact the **1984** Regional Plan totally and permanently precluded any construction on or reasonable use of approximately 98% (not more than 75 out of approximately 3300 **were** potentially eligible for approval to build) of the remaining Class 1, 2, and 3 lawfully-created lots or parcels in the State of California portion of the Lake Tahoe Basin, including the properties owned by the Plaintiffs identified in Paragraph 6 above. Further, although the **1984** Regional Plan specified that there shall be a new "development evaluation system" created to review the extremely limited number of Class 1, 2, or 3 lots or parcels that may qualify for the "alleged exception" to the foregoing prohibitions, that new evaluation **system was never implemented by TRPA**. As a consequence **of all the foregoing**, those Plaintiffs identified in Paragraph 6 **(Class 1, 2, and 3 Plaintiffs) were** deprived of the entire practical, substantial, viable, beneficial, reasonable, economic and feasible use of their properties **for the specific periods specified in the pertinent Appendix applicable to each individual named Plaintiff is property**.

VIII. THE 1987 REGIONAL PLAN, PURCHASES BY PUBLIC BUY-OUT AGENCIES, AND OTHER FACTORS AFFECTING THE DURATION AND EXTENT OF TAKING.

31. Following adoption of the 1984 Regional Plan and the successful pursuit of a legal challenge in the Eastern District of California against that Plan leading to the issuance of a preliminary injunction on August 9, 1984, the Defendant TRPA chose to appeal that determination to the Ninth Circuit. After briefing, that appeal was heard by the Ninth Circuit and a decision rendered on July 22, 1985 upholding the district court's issuance of the preliminary injunction. (*People of California v. TRPA*, 766 F.2d 1308 (9th Cir. 1985.) Meanwhile, the instant litigation had been filed, as well as the companion case in the District Court for the District of Nevada. In spite of the pendancy [sic] of all of that litigation challenging the litigimacy of TRPA's 1984 Regional Plan on various grounds, the Defendant TRPA nevertheless chose steadfastly to defend its adopted 1984 Plan in court for many months, rather than to rescind, repeal, modify, or even reopen its 1984 Regional Plan deliberations. However, following its unsuccessful effort at the Ninth Circuit to overturn the preliminary injunction as well as the appointment of a new TRPA Executive Director, TRPA began to alter course and established a process to try to "renegotiate" its 1984 Regional Plan with interested parties. Accordingly, for a period of nearly two years following the denial by the Ninth Circuit of TRPA's appeal of the district court's preliminary injunction, TRPA pursued a

process called "consensus negotiations", that is, negotiations facilitated by a third party, dealing with a wide range of regional plan issues. The consensus negotiations were long and drawn out, given the highly complex and detailed nature of the subject. Finally, in late 1986, tentative agreements began to emerge on various elements of a revised Regional Plan, and the TRPA Governing Board then preliminarily adopted, on September 17, 1986, the initial amendments to the Goals and Policies portion of its Regional Plan. Thereafter, an extensive effort was begun to develop and recommend the content of numerous lengthy and complex implementing ordinances. Additionally, a detailed litigation settlement agreement and related proposed implementing ordinances were negotiated between the TRPA and the California Attorney General and the League to Save Lake Tahoe regarding their pending litigation, ultimately leading to approval by TRPA of Ordinance No. 87-8, followed by Ordinance 87-9 adopted on second reading on June 25, 1987. Pursuant to the terms of the latter ordinance, the effective date of the 1987 Regional Plan was established as of June 1, 1987, at which time the 1984 Regional Plan was deemed repealed. Importantly, throughout that entire process, the 1984 Regional Plan remained in full force and effect, and was the underlying policy document setting forth TRPA's policy regarding the use of named Plaintiffs' property.

32. The 1987 Regional Plan expressly continued the prohibitions in the 1984 Regional Plan on land coverage and land disturbance in SEZ areas, or in Land Capability Districts 1, 2, or 3 until such time as the new Individual Parcel Evaluation System (IPES) provided

for in the 1987 Regional Plan was implemented, which that new Plan specified was to be January 1, 1989. Thus, Policy 2, of Goal 1, of the Soils Sub-Element of the Conservation Element, specifically provided that: "NO NEW LAND COVERAGE OR OTHER PERMANENT DISTURBANCE SHALL BE PERMITTED IN LAND CAPABILITY DISTRICTS 1-3 [except for single-family dwellings ultimately approved under IPES]." Similarly, exactly like the predecessor 1984 Regional Plan, the SEZ policies of the 1987 Regional Plan also provided that SEZs could only be used for forest management practices, stream improvement programs, and habitat restoration projects, and, that "NO NEW LAND COVERAGE OR OTHER PERMANENT DISTURBANCE SHALL BE PERMITTED IN STREAM ENVIRONMENT ZONES (with very limited exceptions not applicable to construction of single-family homes)." See Policy 5, Goal 1, Stream Environment Zone Sub-Element, of the Conservation Element of the 1987 Regional Plan. Thus, the 1987 Regional Plan continued in full force and effect, and nearly word for word, the outright prohibitions on use of SEZ lots contained in the predecessor 1984 Regional Plan. As to the prohibitions on use of or construction of single-family homes in Class 1, 2, and 3 areas, the 1987 Regional Plan also carried forward, nearly word for word, the same prohibitions contained in the 1984 Regional Plan, but provided that an exception, known as the Individual Parcel Evaluation System (IPES), would be developed and implemented allegedly not later than December 31, 1988, with new single-family dwelling construction to be evaluated in accordance with that IPES system commencing on January 1,

1989. (See Policy 1, Goal 1, Development and Implementation Priorities, Implementation Element of the 1987 Regional Plan.) However, it was not until July 1, 1989 that the new IPES system was in fact fully developed and finally implemented. Thus, from the effective date of the 1987 Regional Plan (June 1, 1987) to at least July 1, 1989, the 1987 Regional Plan simply continued in full force and effect the prior provisions of the 1984 Regional Plan complained of herein prohibiting any use of Class 1, 2, or 3, or SEZ properties, without any exceptions, for that period of time. Even after July 1, 1989, when IPES became effective, the outright prohibitions on building in a SEZ remained in full force and effect, as the IPES system provided that if a lot was fully within a SEZ, it received a "O" score and continued to be ineligible to receive a building allocation. While the instant litigation primarily involves a challenge against the taking created by the provisions of the 1984 Regional Plan (and its prececessor ordinance 81-5), Plaintiffs nevertheless contend and allege that the complained-of prohibitions set forth in the 1984 Regional Plan were not terminated upon adoption of the 1987 Regional Plan, but to the contrary, were continued in full force and effect by the 1987 Regional Plan. In the case of the SEZ prohibitions, the 1987 Regional Plan continued, nearly word-for-word, the same prohibitions on use of SEZ lots, which prohibitions remain in effect today. In the case of Class 1, 2, and 3 properties, the nearly identical prohibitions found in the 1984 Regional Plan were carried forward virtually word-by-word in the 1987 Plan, at least until implementation of IPES on

July 1, 1989, six-months after the Plan's specified deadline.

33. As to the Individual Parcel Evaluation System (IPES), to the extent that that IPES program continued the prohibition on use of Class 1, 2, and 3 properties owned by named Plaintiffs in the instant litigation by giving them a score of less than "buildable", and by failing to fully implement the provisions in a timely way, and by preventing the "pass/fail" line to be lowered over a period of time as required by the 1987 Plan so that all such Class 1, 2, and 3 lots would become "buildable" as provided in the 1987 Plan, it now appears clear that the implementation of the IPES program by the Defendant TRPA has resulted in a further purposeful continuation of the prohibitions contained in the 1984 Plan as to the use of those Class 1, 2, and 3 properties receiving IPES scores by TRPA below the so-called IPES "pass-fail line". Therefore, in the case of the affected named Plaintiffs specified in the attached Appendices, it is further alleged and contended that those prohibitions on any viable use of Class 1, 2, or 3 lands created by the 1984 Regional Plan were not only continued *de facto* by the terms of the 1987 Plan until implementation of the IPES system on July 1, 1989, but as to those named Plaintiffs receiving IPEs scores of less than the so-called "passing score", those named Plaintiffs were effectively simply reclassified to ensure that the prior prohibitions on their property continued in full force and effect for a further period of time, which further period of time when combined with the prior period of prohibition created by the 1984 Plan and

ordinance 81-5, constitutes the period of the taking created by the original permanent prohibition on their property imposed by the passage and implementation of the 1984 Regional Plan, and its predecessor Ordinance 81-5. As to all named Plaintiffs affected by the terms of the 1987 Regional Plan, the specific effect of that Plan on the period of the taking involved as to each named Plaintiff is expressly set forth in the specific allegations contained in the pertinent Appendices attached hereto.

34. Further, during the pendency of this litigation, a substantial number of named Plaintiffs felt compelled, absent any other viable option, and in order to off-set and mitigate the damages they had incurred, to sell their property to one of two public buy-out programs established on the California-side of the Basin during the pendency of this litigation – either to the United States Government, Department of Agriculture, U.S. Forest Service, pursuant to the terms of the Burton-Santini Act (the Forest Service buy-out), or to the State of California, through the California Tahoe Conservancy. While those public buy-out programs were closely coordinated with TRPA in terms of the eligibility requirements for acquisition, neither program provided any compensation whatsoever for the period of taking that preceded the acquisition by the buy-out agency. Rather, appraisals were prepared to determine so-called "fair market value', as of the date of acquisition, and offers were made in reliance on those appraised prices on a "take-it-or-leave-it" basis – that is, the prices were not negotiable, but were required to be based upon those appraised values. Accordingly, as

specified in the specific allegations of the pertinent Appendices attached hereto, in almost all cases involving Forest Service or California Tahoe Conservancy acquisitions, the appraisals specifically reflected a significant discount over true fair market value, as the appraisals took into account the fact that the properties were deemed "unbuildable" pursuant to the regulatory requirements imposed by TRPA complained of herein. Again, detailed allegations as to each affected named Plaintiff are set forth in the pertinent Appendices attached hereto.

IX. CLAIMS FOR RELIEF

Based on the foregoing factual allegations, and as further alleged in the Appendices hereto, Plaintiffs seek the following relief from this Court:

FIRST (Formerly SECOND) CLAIM FOR RELIEF

(SEZ Properties – Damages for Violation of Fifth and Fourteenth Amendment Protections Against Taking Private Property Without Just Compensation)

35. Plaintiffs reallege and incorporate herein by this reference all of the allegations in Paragraphs 1 to 34 above.

36. The enactment by the Defendant TRPA of those provisions in its 1984 Regional Plan prohibiting all reasonable use of those legally-created lots or parcels within areas identified as so-called Stream Environment Zones, as set forth and alleged in greater detail in Paragraphs 25 through 27 above, coupled with the interim moratorium

enacted by the Defendant TRPA on June 25, 1981 (Ordinance 81-5) applicable to Stream Environment Zone properties and the 8-month moratorium as alleged in greater detail in Paragraphs 20 and 22 above, which were subsequently continued in full force and effect by the terms of the 1987 Regional Plan which superseded the 1984 Regional Plan, on their face have permanently, directly, and totally deprived, confiscated, and taken the private properties of each name Plaintiff identified in Paragraph 5, have deprived such Plaintiffs of all practical, viable, beneficial, reasonable and feasible use of their properties, and have made their properties virtually unmarketable and of no value to such Plaintiffs, without any compensation therefore [sic], for the specific periods of time specified in the pertinent Appendix attached hereto applicable to each named Plaintiff's property, all in the name of environmental protection and hence for public use and benefit, and therefore indirect violation of the Fifth and Fourteenth Amendments to the Constitution.

37. For the reasons set forth hereinabove, an actual controversy exists between such Plaintiffs and Defendants related to their respective legal rights and obligations. Those named Plaintiffs identified in Paragraph 5 above allege that the aforementioned provisions of the Defendant TRPA's 1984 Regional Plan applicable to privately-owned properties in SEZ areas, which made permanent the similar interim provisions set forth in TRPA's Ordinance 81-5, and which were continued in effect by TRPA even after the replacement of its 1984 Regional Plan by the comparable provisions of its 1987 Regional Plan, constitute an unconstitutional taking and confiscation of their properties in violation of the Fifth and Fourteenth

Amendments to the Constitution, and Defendants contend to the contrary. Such Plaintiffs have suffered and will continue to suffer irreparable injury as a result of Defendants' actions, and they have no other reasonable administrative remedy to pursue. Such Plaintiffs therefore seek appropriate declaratory relief determining that the actions of the Defendants complained of above constitute a taking of such Plaintiffs' private properties within the meaning of the Fifth and Fourteenth Amendments to the Constitution. Further, such Plaintiffs seek the award of just compensation as required by the Fifth and Fourteenth Amendments in an amount equal to the fair market value of such Plaintiffs' properties on the date they were totally taken for public use, which Plaintiffs allege was June 25, 1981, the date Defendants initial moratorium was imposed by its Ordinance No. 81-5, or such other amount determined to be just compensation extending from the commencement date of the taking (June 25, 1981) until the Defendant changed its regulations in a manner to permit Plaintiffs the right to build on or make reasonable use of their property, or until such time as Plaintiffs were compelled, absent any other viable option, to sell their property to a public buy-out agency. The specific circumstances and/or period of taking applicable to each affected named Plaintiff is set forth in the individual Appendix applicable to each affected named Plaintiff incorporated herein. The amount of just Compensation, with interest thereon from the date of the original taking, due to each Plaintiff shall be determined based upon the proof submitted at trial applicable to each of such named Plaintiffs' properties.

SECOND (Formerly FIFTH) CLAIM FOR RELIEF

(Class 1, 2, and 3 Properties – Damages for violation of Fifth and Fourteenth Amendment Protections Against Taking Private Property Without Just Compensation

38. Plaintiffs reallege and incorporate herein by this reference all of the allegations in Paragraphs 1 through 34 above.

39. The enactment by the Defendant TRPA of those prohibitions and restrictions contained in the amended Regional Plan permanently prohibiting any use or new development on those legally-created lots or parcels within areas identified by TRPA as so-called Land Capability Classes 1, 2, and/or 3, as alleged in greater detail in Paragraphs 28 through 30 above, coupled with the provisions of the interim moratorium enacted by the Defendant TRPA effective on June 25, 1981 and the 8-month moratorium as alleged in greater detail in Paragraphs 20 and 22 above, and continued in full force and effect by the terms of the 1987 Regional Plan which superseded the 1984 Regional Plan and interim Ordinance 81-5 as also alleged above, on their face have permanently, directly and totally deprived, confiscated, and taken the private properties of each name Plaintiff identified in Paragraph 6 above, by unreasonably and unnecessarily depriving such Plaintiffs of all of their practical, viable, beneficial, reasonable, and feasible use of their properties, and making them virtually unmarketable and of no value to such Plaintiffs, without any compensation therefore [sic], for the period of time specified in the Appendix attached hereto applicable to each affected named Plaintiff, all in the name of environmental protection and hence

allegedly for public use and benefit, and therefore in direct violation of the Fifth and Fourteenth Amendments to the Constitution.

40. For the reasons set forth above, an actual controversy exists between Plaintiffs and Defendants related to their respective legal rights and obligations. Those named Plaintiffs identified in Paragraph 6 above allege that the aforementioned provision of the 1984 Regional Plan applicable to Class 1, 2 and 3 properties, which made permanent the similar provisions set forth in TRPA's interim ordinance 81-5, and which were continued in effect by TRPA even after the replacement of the 1984 Plan by the comparable provisions of its 1987 Regional Plan, constitute an unconstitutional taking of their properties in violation of the Fifth and Fourteenth Amendments to the Constitution, and Defendants contend to the contrary. Such named Plaintiffs have and will continue to suffer irreparable injury as a result of Defendants' actions and have no other reasonable administrative remedy to pursue for the reasons set forth above. Such Plaintiffs therefore seek appropriate declaratory relief as prayed for hereafter and a judgment determining that the actions of the Defendants complained of above constitute a taking of such named Plaintiffs' private property within the meaning of the Fifth and Fourteenth Amendments of the Constitution. Further, such named Plaintiffs seek the award of just compensation as required by the Fifth and Fourteenth Amendment in an amount equal to the fair market value of such Plaintiffs' properties on the date they were totally taken for public use, which Plaintiffs allege is June 25, 1981, the date Defendant TRPA's initial moratorium was imposed by its Ordinance No. 81-5, or

such other amount determined to be just compensation extending form [sic] the commencement date of the taking (June 25, 1981) until the Defendant TRPA changed its regulations in a manner to permit named Plaintiffs the right to build on or make reasonable use of their property, or until such time as named Plaintiffs were compelled, absent any other viable option, to sell their property to a public buy-out agency. The specific circumstances and/or period of taking applicable to each affected named Plaintiff is set forth in the applicable Appendix incorporated herein. The amount of Just Compensation, with interest thereon from the date of the original taking, due to each affected named Plaintiff shall be determined based upon the proof submitted at trial applicable to each of such named Plaintiffs' properties.

THIRD (Formerly SEVENTH) CLAIM FOR RELIEF

(Violation of the Federal Civil Right's Act – 42 U.S.C. 1983 and 1985)

41. Plaintiffs reallege and incorporate herein by this reference all of the allegations in Paragraphs 1 through 40 above.

42. Defendant TRPA, acting in its official capacities and under color of State law, and in concert with the Defendant States as alleged above, by virtue of its adoption of those provisions of the **1984** Regional Plan complained of above, as well as its enactment of those interim moratoria alleged in Paragraphs 20 and 22 above, and combined with its enactment of the comparable portions of the successor 1987 Regional Plan as also alleged above,

has precluded all named Plaintiffs identified in Paragraphs 5 and 6 above from making any practical, viable, beneficial, feasible or reasonable use of their private properties **for the periods of time specified in the applicable Appendices attached hereto, and has** caused **named** Plaintiffs to be deprived of their rights and privileges secured by the Constitution, and particularly their right not be deprived of their **private** property without due process of the law and their right not to have their **private** property taken **for public use** without Just Compensation, all as more specifically alleged in the foregoing Claims for Relief. As a direct result of Defendants' actions, which actions constitute an intentional and purposeful denial of Plaintiffs' rights protected and guaranteed to them by the Constitution, each named Plaintiff has suffered substantial personal damages, in the amount to be determined based upon the proof to be submitted at trial. Accordingly, pursuant to the provisions of 42 U.S.C. 1983 and 1985(3), Plaintiffs, and each of them seek appropriate declaratory relief against Defendants **and damages against TRPA** as prayed for hereafter.

WHEREFORE, Plaintiffs pray for relief as follows:

1. On the **FIRST** CLAIM FOR RELIEF, for a determination and declaration by the Court that the prohibitions and restrictions adopted by the Defendant TRPA totally prohibiting and precluding those Plaintiffs owning properties in areas designated as SEZs from making any reasonable or practical use of their property, and prohibiting any building or development thereon, including specifically those provisions identified and set forth **above in this** Complaint, constituted an unconstitutional taking of such **named** Plaintiffs' properties within the

meaning of the Fifth and Fourteenth Amendments to the Constitution; and for an award of damages against Defendant TRPA to provide just compensation for the taking of such **named** Plaintiffs' properties in an amount to be determined upon the basis of proof submitted at trial, or before a Master or Commission as shall be appointed by the Court, plus interest thereon from the effective date of the taking, **for the period of the taking found to be applicable in the case of each named Plaintiff.**

2. On the **SECOND** CLAIM FOR RELIEF, for a determination and declaration by the Court that the prohibitions and restrictions adopted by the Defendant TRPA totally prohibiting and precluding those Plaintiffs owning properties in areas designated within Class 1, 2, and/or 3 Land Capability Districts from making any reasonable or practical use of their property, and prohibiting any building or development thereon, including specifically those provisions identified and set forth **above in this** Complaint, constitute an unconstitutional taking of such Plaintiffs' properties within the meaning of the Fifth and Fourteenth Amendments of the Constitution; and for an award of damages against Defendant TRPA to provide just compensation for the taking of such Plaintiffs' properties in an amount to be determined upon the basis of proof submitted at trial, or before a Master or commission as shall be appointed by the Court, plus interest thereon from the effective date of the taking, **for the period of the taking found to be applicable in the case of each named Plaintiff.**

3. On the THIRD CLAIM FOR RELIEF, for an order and judgment of the Court declaring that the provisions

of the **1984** Regional Plan complained of herein, as well as the **predecessor** interim moratoria alleged in Paragraphs 20 and 22 above and the **applicable provisions of the successor 1987 Regional Plan**, have caused **named** Plaintiffs to be deprived of their rights and privileges secured by the Constitution, particularly their right not to be deprived of their property without due process of law **and** their right not to have their property taken without just compensation; and for an award of damages against the Defendant TRPA to provide just compensation for the taking of the **named** Plaintiffs' properties in an amount to be determined upon the basis of proof submitted at trial, or before a Master or Commission as shall be appointed by the Court, plus interest thereon from the effective date of the taking, **for the period of the taking found to be applicable in the case of each affected Plaintiff.**

4. For costs of suit.

5. For reasonable attorneys' fees, recoverable under the provisions of 42 U.S.C. Section 1988, 42 U.S.C. Section 4654, and other applicable law.

6. For such other relief as this Court deems proper and just.

Dated: March 17, 1992

HOFFMAN, LIEN, FACCINTO,
GARNETT & LIEBERMAN

by: /s/ Lawrence L. Hoffman
Lawrence L. Hoffman,
Attorney for Plaintiffs

APPENDIX NO. I-2

PLAINTIFF CLARENCE C. BENEDICT

1. Plaintiff CLARENCE C. BENEDICT, is the **former** owner of those certain single-family residential lot commonly known as Lot Nos. 84 and 85, Alpine Peaks subdivision, described as Placer County Assessor Parcel Nos. 83-420-21 and 83-420-22 respectively, and located in the unincorporated portion of Placer County, State of California. Plaintiff CLARENCE C. BENEDICT currently resides at **8507 East Via Los Libros, Scottsdale, Arizona.** The Alpine Peaks subdivision, in which Plaintiff's lots are located, is a previously legally-approved subdivision, approximately 30% built-out in the area neighboring Plaintiff's lots, served by paved roads, sewers, water, electricity, and other utilities. Plaintiff's lots front on Courcheval Drive, a paved County road within said subdivision.

2. Plaintiff purchased said lots in 1969, and since that date timely paid all property taxes when due, and those public assessments for bonds used to fund and construct sewer and water facilities to serve said lots, including but not limited to those constructed by the Tahoe City Public Utility District and the Tahoe Truckee Sanitation Agency. **As of the date of filing this action,** comparable lots in the same neighborhood as Plaintiff's lots had a fair market value of approximately $20,000.00 if they **could** be utilized as single-family homesites. Plaintiff purchased his lots for the purpose of building a vacation home.

3. The use of Plaintiff's lots as single-family homesites **at all times relevant hereto was** permitted under

applicable zoning of the County of Placer, and Defendant TRPA's **1984 and 1987** Regional Plans designated the Alpine Peaks subdivision as a residential area allowing for new single-family residential housing, and continuation of existing residential development. Because of their location in an existing residential subdivision, the applicable local zoning, and other restrictions contained in TRPA's **1984 and 1987** Regional Plans, there **were** no other reasonable, practical, viable or feasible uses to which Plaintiff **could** put his property except for the construction of a single-family home.

4. Plaintiff's lots **were** shown on the TRPA **1984** Regional Plan Maps (Map No. A-8 attached hereto), and/or in the computerized data base of the TRPA, as being at least 25% within a Stream Environment Zone. Based upon said classification and in view of the prohibitions and restrictions contained in TRPA's **1984** Regional Plan and TRPA's Ordinance 81-5, as more particularly set forth in **the** Complaint, **Plaintiff was totally precluded from making any viable use of said property**.

5. Upon adoption of the 1987 Regional Plan, **TRPA's** prohibition on use of Plaintiff's property remained in effect until the criteria set forth in the new Individual Parcel Evaluation System (IPES) were applied to Plaintiff's property by **TRPA**. However, prior to receiving his **IPES** score, Plaintiff felt compelled to sell his property on July 1, 1988, to the United States Forest Service for the take-it-or-leave-it price of $12,000.00 per lot, there being no viable use to which he could put his property. Additionally, as a requirement of the sale to the Forest Service, Plaintiff was required to pay-off, out of the sale proceeds,

any balance due on the aforementioned assessment obligations, for which he received no possible benefit. The sale was based on a government appraised value as of the date of the sale which reflected a significant discount in value due to TRPA's restrictions on buildability and specifically excluded any compensation for the period of time from June 25, 1981 (effective date of adoption of ordinance 81-5) to July 1, 1988 (date of sale to the Forest Service), during which period Plaintiff owned his property and was totally prohibited and precluded by **TRPA** from using his property to build a single-family home, or **from** undertaking any other development or building on said real property, thereby depriving Plaintiff of substantially all reasonable and practical use of his property, making said property virtually unmarketable, **except by "forced sale" to the government**, and denying and taking all of the special benefits paid for by Plaintiff in connection with those special assessments levied against said property to pay for sewer and water improvements to serve said property.

APPENDIX NO. II-2

PLAINTIFFS LAURA L. ANDERSON AND JAMES E. ANDERSON; LINDA A. THOMPSON AND ALLAN J. THOMPSON

1. Plaintiffs LAURA L. ANDERSON and JAMES E. ANDERSON; LINDA A. THOMPSON and ALLAN J. THOMPSON are the owners of that certain single-family residential lot commonly known as Lot No. 6, Block Q,

Lakeshore Manor, described as El Dorado County Assessor Parcel No. 29-111-04, and located in the unincorporated portion of El Dorado County, State of California. The Lakeshore Manor subdivision, in which Plaintiffs' lot is located, is a previously legally-approved subdivision, served by paved roads, sewers, water, electricity, and other utilities. Plaintiffs' lot fronts on Beach Road, a paved County road within said subdivision.

2. Plaintiffs purchased said lot in 1979, and since that date timely paid all property taxes when due, and those public assessments for bonds used to fund and construct sewer and water facilities to serve said lot, including but not limited to those constructed by the South Tahoe Public Utility District. Plaintiffs purchased their lot for the purpose of building a principal residence.

3. The use of Plaintiffs' lot as a single-family homesites **at all times relevant hereto was** permitted under applicable zoning of the County of El Dorado, and Defendant TRPA's **1984 and 1987** Regional Plans designated the Lakeshore Manor subdivision as a residential area allowing for new single-family residential housing, and continuation of existing residential development. Because of its location in an existing residential subdivision, the applicable local zoning, and other restrictions contained in TRPA's **1984 and 1987** Regional Plans, there are no other reasonable, practical, viable or feasible uses to which Plaintiffs can put their property except for the construction of a single-family home.

4. Plaintiffs' lot **was** shown on the TRPA **1984** Regional Plan Maps (Map No. H-17 attached hereto),

and/or in the computerized data base of the TRPA, as being 100% within a Stream Environment Zone.

Based upon said classification and in view of the prohibitions and restrictions contained in TRPA's **1984** Regional Plan and TRPA's Ordinance 81-5, as more particularly set forth in **the** Complaint, Plaintiffs **were** prohibited and precluded **by TRPA** from using **said** property to build a single-family home, or **from** undertaking any other development or building on said real property.

5. Upon adoption of the 1987 Regional Plan, the prohibition on use of Plaintiffs' property remained in effect until the criteria set forth in the new Individual Parcel Evaluation System (IPES) were applied to Plaintiffs' property by TRPA. By letter dated February 10, 1989, Plaintiffs were advised by TRPA that it had completed the Individual Parcel Evaluation System (IPES) scoring of Plaintiffs' parcel, and that on December 21, 1988, the TRPA Governing Board had determined that lots with a score of less than 725 points were not eligible to build. Plaintiffs' IPES score of 0 points, reflecting its "SEZ" condition, therefore continued to render Plaintiffs' property "unbuildable" under the IPES system. No appeal of that IPES score was taken, as Plaintiffs did not dispute that the IPES criteria had been correctly applied to their lot, and therefore any such appeal would have been futile. As of the date of filing of this First Amended Complaint, Plaintiffs 2 continue to be prohibited from making any practical or viable use of their property by the complained-of regulations of TRPR, which were first adopted on June 25, 1981, and have prohibited any such use of said property from that date to present.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

TAHOE-SIERRA PRESERVATION COUNCIL, INC., et al. Plaintiffs, v. TAHOE REGIONAL PLANNING AGENCY, et al. Defendants.	NO. CV-N-84-257-ECR NO. CV-N-92-98-ECR (Filed Aug. 6, 1998) **PRETRIAL ORDER FOR LIABILITY PHASE OF LAWSUIT (~~PROPOSED~~ JOINT ORDER)**
TAHOE-SIERRA PRESERVATION COUNCIL, INC., et al. Plaintiffs, v. TAHOE REGIONAL PLANNING AGENCY, et al. Defendants.	

FACTS – GENERAL:

48. Lake Tahoe's watershed geology, large lake volume, and limited drainage area are largely responsible for the Lake's sparse algal population and clear waters.

49. During the three periods at issue in this lawsuit (Period 1: Ordinance 81-5 [August 23, 1981 – August 26, 1983]; Period 2: Resolution 83-21 [August 27, 1983 – April 25, 1984]; and Period 3: Injunction [April 26, 1984 – July 1, 1987]), there were approximately 8,000 to 9,000 undeveloped single family lots in the Lake Tahoe Basin which were classified as

Land Capability System Class 1 through 3 lands (including Stream Environment Zone lots).

50. TRPA conducted extensive investigations before developing the environmental threshold carrying capacities ("thresholds") and the 1984 plan, with extensive public participation.

51. TRPA forcefully but unsuccessfully resisted the issuance of a Temporary Restraining Order and subsequent Preliminary Injunction in the cosolidated federal lawsuits entitled *League to Save Lake Tahoe v. TRPA* and *People v. TRPA* (East. Dist. of Calif. Case Nos. 84-0565 EJC and 84-0561 EJC).

52. From 1975 through 1996, Federal, State and local governments have authorized or appropriated over $378 million for efforts to restore and maintain Lake Tahoe's water quality (including funding to purchase environmentally sensitive lots); approximately $247 million of this is from the States of California and Nevada.

53. The California Tahoe Conservancy is a California state agency, which has expended significant monies since its inception in 1985 on programs designated to benefit water quality in the Lake Tahoe Basin. As of May 27, 1997, this has included the following approximate expenditures:

$55.7 million for the acquisition of 4,052 parcels (approximately 5,348 acres). Of this total, approximately $13 million was expended to acquire 1266 parcels (approximately 1,307 acres) during the third period of this lawsuit: April 26, 1984 – July 1, 1987;

$35.1 million in grants to local governments to fund site acquisition and construction costs of 72 erosion control projects (of this total, approximately $7.4 million was granted for 29 projects during the third period of this lawsuit);

$2.5 million in grants to fund site acquisition and construction costs of seven projects to restore Stream Environment Zones and/or watersheds.

54. The Nevada Division of State Lands is a Nevada state agency which has expended significant monies pursuant to Nevada's Tahoe Basin Act of 1986 to purchase environmentally sensitive private residential lots in the Lake Tahoe Basin in an effort to stem further degradation of Lake Tahoe. As of May 1, 1997, 496 parcels were purchased for a total cost of over $25 million.

55. From October 1, 1981 through February 19, 1997, the United States Forest Service (USFS) acquired 3,482 environmentally sensitive Lake Tahoe Basin private lots (totaling 11,482.54 acres) under its Santini-Burton Land Acquisition Program (which is authorized by Public Law 96-586, commonly called the Santini-Burton Act.) Most were acquired through purchase, at a cost of approximately $92 million; the remainder were donated. Acquisitions and expenditures during the three periods of this lawsuit were as follows:

Period 1 (August 23, 1981 – August 26, 1983):

California – 215 parcels acquired for $4,156,500

Nevada – 45 parcels acquired for $1,776,500

Period 2 (August 27, 1983 – April 25, 1984):

California – 167 parcels acquired for $4,871,800

Nevada – 27 parcels acquired for $1,126,000

Period 3 (April 26, 1984 – July 1, 1987):

California – 896 parcels acquired for $12,738,425

Nevada – 394 parcels acquired for $13,171,143

56. From October 1, 1983, through September 30, 1995, the USFS allocated over $16 million to local governments for erosion control projects designed to benefit Lake Tahoe's water quality. These included the following allocations: Fiscal Year (FY)[2] 1984: $2,717,346; FY 1985: $1,410,920; FY 1986: $1,325,943; FY 1987: 1,191,538.

57. Between 1981 and 1984, some owners of South Lake Tahoe lots in land capability districts 1, 2 and 3 (including Stream Environment zones) were able to, and some did, sell sewer and building allocations to owners of higher-capability lots. Some allocations sold for between $15,000 and $30,000.

58. Some parcels in this lawsuit were owned by plaintiffs who owned more than one lot within the Tahoe region.

* * *

DANIEL E. LUNGREN, Attorney General
of the State of California
RICHARD M. FRANK (CSB 63482)
Senior Assistant Attorney General
DANIEL L. SIEGEL (CSB 67536)
Supervising Deputy Attorney General
MARY J. SCOONOVER (CSB 131259)
Deputy Attorney General
1300 I Street
P.O. Box 944255
Sacramento, CA 92444-2550
Telephone: (916) 327-7880
Attorneys for Defendant State of California

FRANKIE SUE DEL PAPA, Attorney General
of the State of Nevada
WILLIAM J. FREY (NV State Bar No. 4266)
Deputy Attorney General
Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-7321
Telephone: (702) 687-7321
Attorneys for Defendant State of Nevada

LAWRENCE L. HOFFMAN (CSB 40204)
HOFFMAN LAW OFFICES
3000 No. Lake Boulevard
P.O. Box 7740
Tahoe City, CA 96145
Telephone: (702) 831-8542
(530) 583-8542
Attorneys for Plaintiffs

(Additional Attorneys for Defendants listed on the following page.)

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

TAHOE-SIERRA PRESERVATION COUNCIL, INC., et al. Plaintiffs, v. TAHOE REGIONAL PLANNING AGENCY, et al., Defendants.	**NO. CV-N-84-257-ECR-(PHA)** **NO. CV-N-92-98-ECR-(PHA)** (Filed Sep. 9, 1998)
TAHOE-SIERRA PRESERVATION COUNCIL, INC., et al., Plaintiffs, v. TAHOE REGIONAL PLANNING AGENCY, et al., Defendants.	**STIPULATION NOT TO INTRODUCE EVIDENCE REGARDING INDIVIDUAL PLAINTIFFS; ORDER** Hearing Date: Sept. 10, 1998 Hearing Time: 2:00 p.m. Courtroom: 1

SUSAN E. SCHOLLEY (NV State Bar No. 531)
Tahoe Regional Planning Agency
P.O. Box 1038
Zephyr Cove, NV 89448
Telephone: (702) 588-4547
Fax: (702) 588-4527
Attorney for Defendant, Tahoe Regional Planning Agency

E. CLEMENT SHUTE, JR. (CA State Bar No. 36592)
ELLISON FOLK (CA Stare [sic] Bar No. 149232)
SHUTE, MIHALY & WEINBERGER
396 Hayes Street
San Francisco, CA 94102
Telephone: (415) 552-7272
Attorneys for Defendant, Tahoe Regional
Planning Agency

J. THOMAS SUSICH, (NV Bar No. 898)
CROWELL, SUSICH, OWEN & TACKES, LTD.
510 W. Fourth Street
P.O. Box 1000
Carson City, NV 89710
Telephone: (702) 882-1311
Attorneys for Defendant, Tahoe Regional
Planning Agency

It is hereby stipulated between the parties that since this lawsuit consists of a facial, as opposed to an as applied, inverse condemnation challenge of Tahoe Regional Planning Agency development restrictions, the parties will not introduce evidence regarding the specific factual situations of individual plaintiffs during the liability phase of this lawsuit. As part of this stipulation, the parties agree that, during the liability phase of this lawsuit:

1. No plaintiff depositions shall be offered as previously listed in the Pretrial Order (p. 40, lines 12-28; pp. 41-45); and

2. No plaintiff shall be called as a witness as previously designated in the Pretrial Order (Exhibit D, p. 1, lines 22-28; p. 2).

Each party shall bear its own fees and costs in this matter.

The parties respectfully request that the Pretrial Order (p. 40, lines 12-28; pp. 41-45; and Exhibit D, p. 1, lines 22-28; p. 2) be modified to reflect this stipulation.

Dated: 9/2/98

DANIEL E. LUNGREN, Attorney General
of the State of California
RICHARD M. FRANK, Sr. Assistant
Attorney General

/s/ Daniel L. Siegel
DANIEL L. SIEGEL, Supervising
Deputy Attorney General
MARY J. SCOONOVER
Deputy Attorney General
Attorneys for Defendant,
State of California
On behalf of all Defendants

FRANKIE SUE DEL PAPA,
Attorney General
for the State of Nevada
WILLIAM FREY
Deputy Attorney General
Attorneys for Defendant,
State of Nevada

TAHOE REGIONAL
PLANNING AGENCY
SUSAN E. SCHOLLEY
Attorney for Tahoe Regional
Planning Agency

SHUTE, MIHALY &
WEINBERGER
E. CLEMENT SHUTE, JR.
Attorneys for Tahoe Regional
Planning Agency

CROWELL, SUSICH, OWEN &
TACKES, LTD.
J. THOMAS SUSICH
Attorneys for Tahoe Regional
Planning Agency

Dated: 9/4/98

HOFFMAN LAW OFFICES

/s/ Lawrence Hoffman
LAWRENCE HOFFMAN
Attorneys for Plaintiffs

IT IS SO ORDERED:

Dated: Sept. 9, 1998

/s/ Edward C. Reed
JUDGE OF THE UNITED STATES
DISTRICT COURT,
DISTRICT OF NEVADA

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

PLAINTIFFS' EXHIBIT 1

PUBLIC LAW 96-551 – DEC. 19, 1980
Public Law 96-551
96th Congress

An Act

To grant the consent of the Congress to the Tahoe Regional Planning Compact, and to authorize the Secretary of Agriculture and others to cooperate with the planning agency thereby created.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in order to encourage the wise use and conservation of the waters of Lake Tahoe and of the resources of the area around said lake, the consent of the Congress is hereby given to the Tahoe Regional Planning Compact heretofore adopted by the States of California and Nevada, which compact reads as follows:

TAHOE REGIONAL PLANNING COMPACT

ARTICLE I. – FINDINGS AND DECLARATIONS OF POLICY

(a) It is found and declared that:

(1) The waters of Lake Tahoe and other resources of the region are threatened with deterioration or degeneration, which endangers the natural beauty and economic productivity of the region.

(2) The public and private interests and investments in the region are substantial.

(3) The region exhibits unique environmental and ecological values which are irreplaceable.

(4) By virtue of the special conditions and circumstances of the region's natural ecology, developmental pattern, population distribution and human needs, the region is experiencing problems of resource use and deficiencies of environmental control.

(5) Increasing urbanization is threatening the ecological values of the region and threatening the public opportunities for use of the public lands.

(6) Maintenance of the social and economic health of the region depends on maintaining the significant scenic, recreational, educational, scientific, natural and public health values provided by the Lake Tahoe Basin.

(7) There is a public interest in protecting, preserving and enhancing these values for the residents of the region and for visitors to the region.

(8) Responsibilities for providing recreational and scientific opportunities, preserving scenic and natural areas, and safeguarding the public who live, work and play in or visit the region are divided among local governments, regional agencies, the States of California and Nevada, and the Federal Government.

(9) In recognition of the public investment and multistate and national significance of the recreational values, the Federal Government has an interest in the acquisition of recreational property and the management of resources in the region to preserve environmental and recreational values, and the Federal Government should assist the States in fulfilling their responsibilities.

(10) In order to preserve the scenic beauty and outdoor recreational opportunities of the region, there is a need to insure an equilibrium between the

region's natural endowment and its manmade environment.

(b) In order to enhance the efficiency and governmental effectiveness of the region, it is imperative that there be established a Tahoe Regional Planning Agency with the powers conferred by this compact including the power to establish environmental threshold carrying capacities and to adopt and enforce a regional plan and implementing ordinances which will achieve and maintain such capacities while providing opportunities for orderly growth and development consistent with such capacities.

(c) The Tahoe Regional Planning Agency shall interpret and administer its plans, ordinances, rules and regulations in accordance with the provisions of this compact.

Article II. – Definitions

As used in this compact:

(a) "Region," includes Lake Tahoe, the adjacent parts of Douglas and Washoe Counties and Carson City, which for the purposes of this compact shall be deemed a county, lying within the Tahoe Basin in the State of Nevada, and the adjacent parts of the counties of Placer and El Dorado lying within the Tahoe Basin in the State of California, and that additional and adjacent part of the county of Placer outside of the Tahoe Basin in the State of California which lies southward and eastward of a line starting at the intersection of the basin crestline and the north boundary of section 1, thence west to the northwest corner of section 3, thence south to the intersection of the basin crestline and the west boundary of section 10; all

sections referring to township 15 north, range 16 east, M.D.B. & M. The region defined and described herein shall be as precisely delineated on official maps of the agency.

(b) "Agency" means the Tahoe Regional Planning Agency.

(c) "Governing body" means the governing board of the Tahoe Regional Planning Agency.

(d) "Regional plan" means the long-term general plan for the development of the region.

(e) "Planning commission" means the advisory planning commission appointed pursuant to subdivision (h) of article III.

(f) "Gaming" means to deal, operate, carry on, conduct, maintain or expose for play any banking or percentage game played with cards, dice or any mechanical device or machine for money, property, checks, credit or any representative of value, including, without limiting the generality of the foregoing, faro, monte, roulette, keno, bingo, fantan, twenty-one, blackjack, seven-and-a-half, big injun, klondike, craps, stud poker, draw poker or slot machine, but does not include social games played solely for drinks, or cigars or cigarettes served individually, games played in private homes or residences for prizes or games operated by charitable or educational organizations, to the extent excluded by applicable State law.

(g) "Restricted gaming license" means a license to operate not more than 15 slot machines on which a quarterly fee is charged pursuant to NRS 463.373 and no other games.

(h) "Project" means an activity undertaken by any person, including any public agency, if the activity may substantially affect the land, water, air, space or any other natural resources of the region.

(i) "Environmental threshold carrying capacity" means an environmental standard necessary to maintain a significant scenic, recreational, educational, scientific or natural value of the region or to maintain public health and safety within the region. Such standards shall include but not be limited to standards for air quality, water quality, soil conservation, vegetation preservation and noise.

(j) "Feasible" means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social and technological factors.

(k) "Areas open to public use" means all of the areas within a structure housing gaming under a nonrestricted license except areas devoted to the private use of guests.

(l) "Areas devoted to private use of guests" means hotel rooms and hallways to serve hotel room areas, and any parking areas. A hallway serves hotel room areas if more than 50 percent of the areas on each side of the hallway are hotel rooms.

(m) "Nonrestricted license" means a gaming license which is not a restricted gaming license.

ARTICLE III. – ORGANIZATION

(a) There is created the Tahoe Regional Planning Agency as a separate legal entity.

The governing body of the agency shall be constituted as follows:

(1) California delegation:

(A) One member appointed by each of the county boards of supervisors of the counties of El Dorado and Placer and one member appointed by the city council of the city of South Lake Tahoe. Any such member may be a member of the county board of supervisors or city council, respectively, and shall reside in the territorial jurisdiction of the governmental body making the appointment.

(B) Two members appointed by the Governor of California, one member appointed by the speaker of the assembly of California and one member appointed by the senate rules committee of the State of California. The members appointed pursuant to this subparagraph shall not be residents of the region and shall represent the public at large within the State of California.

(2) Nevada delegation:

(A) One member appointed by each of the boards of county commissioners of Douglas and Washoe Counties and one member appointed by the board of supervisors of Carson City. Any such member may be a member of the board of

county commissioners or board of supervisors, respectively, and shall reside in the territorial jurisdiction of the governmental body making the appointment.

(B) One member appointed by the Governor of Nevada, the secretary of State of Nevada or his designee, and the director of the State department of conservation and natural resources of Nevada or his designee. Except for the secretary of State and the director of the State department of conservation and natural resources, the members or designees appointed pursuant to this subparagraph shall not be residents of the region. All members appointed pursuant to this subparagraph shall represent the public at large within the State of Nevada.

(C) One member appointed for a 1-year term by the six other members of the Nevada delegation. If at least four members of the Nevada delegation are unable to agree upon the selection of a seventh member within 60 days after the effective date of the amendments to this compact or the occurrence of a vacancy on the governing body for that State the Governor of the State of Nevada shall make such an appointment. The member appointed pursuant to this subparagraph may, but is not required to, be a resident of the region within the State of Nevada.

(3) If any appointing authority under paragraph (1)(A), (1)(B), (2)(A), or (2)(B) fails to make such an appointment within 60 days after the effective date of the amendments to this compact or the occurrence of a vacancy on the governing body, the Governor of the State in which the appointing authority is located shall make the appointment. The term of any member so appointed shall be 1 year.

(4) The position of any member of the governing body shall be deemed vacant if such a member is absent from three consecutive meetings of the governing body in any calendar year.

(5) Each member and employee of the agency shall disclose his economic interests in the region within 10 days after taking his seat on the governing board or being employed by the agency and shall thereafter disclose any further economic interest which he acquires, as soon as feasible after he acquires it. As used in this paragraph, "economic interests" means:

(A) Any business entity operating in the region in which the member or employee has a direct or indirect investment worth more than $1,000.

(B) Any real property located in the region in which the member or employee has a direct or indirect interest worth more than $1,000.

(C) Any source of income attributable to activities in the region, other than loans by or deposits with a commercial lending institution in the regular course of business, aggregating $250 or more in value received by or promised to the member within the preceding 12 months; or

(D) Any business entity operating in the region in which the member or employee is a director, officer, partner, trustee, employee or holds any position of management.

No member or employee of the agency shall make, or attempt to influence, an agency decision in which he knows or has reason to know he has an economic interest. Members and employees of the agency must disqualify themselves from making or participating in the

making of the agency when it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the economic interests of the member or employee.

(b) The members of the agency shall serve without compensation, but the expenses of each member shall be met by the body which he represents in accordance with the law of that body. All other expenses incurred by the governing body in the course of exercising the powers conferred upon it by this compact unless met in some other manner specifically provided, shall be paid by the agency out of its own funds.

(c) Except for the secretary of State and director of the State department of conservation and natural resources of Nevada and the member appointed pursuant to subdivision (a)(2)(C), the members of the governing body serve at the pleasure of the appointing authority in each case, but each appointment shall be reviewed no less often than every 4 years. Members may be reappointed.

(d) The governing body of the agency shall meet at least monthly. All meetings shall be open to the public to the extent required by the law of the State of California or the State of Nevada, whichever imposes the greater requirement, applicable to local governments at the time such meeting is held. The governing body shall fix a date for its regular monthly meeting in such terms as "the first Monday of each month," and shall not change such date more often than once in any calendar year. Notice of the date so fixed shall be given by publication at least once in a newspaper or combination of newspapers whose circulation is general throughout the region and in each

county a portion of whose territory lies within the region. Notice of any special meeting, except an emergency meeting, shall be given by so publishing the date and place and posting an agenda at least 5 days prior to the meeting.

(e) The position of a member of the governing body shall be considered vacated upon his loss of any of the qualifications required for his appointment and in such event the appointing authority shall appoint a successor.

(f) The governing body shall elect from its own members a chairman and vice chairman, whose terms of office shall be 2 years, and who may be reelected. If a vacancy occurs in either office, the governing body may fill such vacancy for the unexpired term.

(g) Four of the members of the governing body from each State constitute a quorum for the transaction of the business of the agency. The voting procedure shall be as follows:

(1) For adopting, amending or repealing environmental threshold carrying capacities, the regional plan, and ordinance, rules, and regulations, and for granting variances from the ordinances, rules and regulations, the vote of at least four of the members of each State agreeing with the vote of at least four members of the other State shall be required to take action. If there is no vote of at least four of the members from one State agreeing with the vote of at least four of the members of the other State on the actions specified in this paragraph, an action of rejection shall be deemed to have been taken.

(2) For approving a project, the affirmative vote of at least five members from the State in which the

project is located and the affirmative vote of at least nine members of the governing body are required. If at least five members of the governing body from the State in which the project is located and at least nine members of the entire governing body do not vote in favor of the project, upon a motion for approval, an action of rejection shall be deemed to have been taken. A decision by the agency to approve a project shall be supported by a statement of findings, adopted by the agency, which indicates that the project complies with the regional plan and with applicable ordinances, rules and regulations of the agency.

(3) For routine business and for directing the agency's staff on litigation and enforcement actions, at least eight members of the governing body must agree to take action. If at least eight votes in favor of such action are not cast, an action of rejection shall be deemed to have been taken. Whenever under the provisions of this compact or any ordinance, rule, regulation or policy adopted pursuant thereto, the agency is required to review or approve any project, public or private, the agency shall take final action by vote, whether to approve, to require modification or to reject such project, within 180 days after the application for such project is accepted as complete by the agency in compliance with the agency's rules and regulations governing such delivery unless the applicant has agreed to an extension of this time limit. If a final action by vote does not take place within 180 days, the applicant may bring an action in a court of competent jurisdiction to compel a vote unless he has agreed to an extension. This provision does not limit the right of any person to obtain judicial review of agency action under subdivision (h) of article VI. The vote of each member of the governing body shall be individually recorded. The governing body shall adopt its own rules, regulations and procedures.

(h) An advisory planning commission shall be appointed by the agency. The commission shall include: The chief planning officers of Placer County, El Dorado County, and the city of South Lake Tahoe in California and of Douglas County, Washoe County and Carson City in Nevada, the executive officer of the Lahontan Regional Water Quality Control Board of the State of California, the executive officer of the Air Resources Board of the State of California, the director of the State department of conservation and natural resources of the State of Nevada, the administrator of the division of environmental protection in the State department of conservation and natural resources of the State of Nevada, the administrator of the Lake Tahoe Management Unit of the United States Forest Service, and at least four lay members with an equal number from each State, at least half of whom shall be residents of the region. Any official member may designate an alternate.

The term of office of each lay member of the advisory planning commission shall be 2 years. Members may be reappointed.

The position of each member of the advisory planning commission shall be considered vacated upon loss of any of the qualifications required for appointments, and in such event the appointing authority shall appoint a successor.

The advisory planning commission shall elect from its own members a chairman and a vice chairman, whose terms of office shall be 2 years and who may be reelected. If a vacancy occurs in either office, the advisory planning

commission shall fill such vacancy for the unexpired term.

A majority of the members of the advisory planning commission constitutes a quorum for the transaction of the business of the commission. A majority vote of the quorum present shall be required to take action with respect to any matter.

(i) The agency shall establish and maintain an office within the region, and for this purpose the agency may rent or own property and equipment. Every plan, ordinance and other record of the agency which is of such nature as to constitute a public record under the law of either the State of California or the State of Nevada shall be open to inspection and copying during regular office hours.

(j) Each authority charged under this compact or by the law of either State with the duty of appointing a member of the governing body of the agency shall by certified copy of its resolution or other action notify the Secretary of State of its own State of the action taken.

Article IV. – Personnel

(a) The governing body shall determine the qualification of, and it shall appoint and fix the salary of, the executive officer of the agency, and shall employ such other staff and legal counsel as may be necessary to execute the powers and functions provided for under this compact or in accordance with any intergovernmental contracts or agreements the agency may be responsible for administering

(b) Agency personnel standards and regulations shall conform insofar as possible to the regulations and procedures of the civil service of the State of California or the State of Nevada, as may be determined by the governing body of the agency; and shall be regional and bistate in application and effect; provided that the governing body may, for administrative convenience and at its discretion, assign the administration of designated personnel arrangements to an agency of either State, and provided that administratively convenient adjustments be made in the standards and regulations governing personnel assigned under intergovernmental agreements.

(c) The agency may establish and maintain or participate in such additional programs of employee benefits as may be appropriate to afford employees of the agency terms and conditions of employment similar to those enjoyed by employees of California and Nevada generally.

Article V. – Planning

(1) In preparing each of the plans required by this article and each amendment thereto, if any, subsequent to its adoption, the planning commission after due notice shall hold at least one public hearing which may be continued from time to time, and shall review the testimony and any written recommendations presented at such hearing before recommending the plan or amendment. The notice required by this subdivision shall be given at least 20 days prior to the public hearing by publication at least once in a newspaper or combination of newspapers whose circulation is general throughout

the region and in each county a portion of whose territory lies within the region.

The planning commission shall then recommend such plan or amendment to the governing body for adoption by ordinance. The governing body may adopt, modify or reject the proposed plan or amendment, or may initiate and adopt a plan or amendment without referring it to the planning commission. If the governing body initiates or substantially modifies a plan or amendment, it shall hold at least one public hearing thereon after due notice as required in this subdivision.

If a request is made for the amendment of the regional plan by:

(1) A political subdivision a part of whose territory would be affected by such amendment; or

(2) The owner or lessee of real property which would be affected by such amendment,

the governing body shall complete its action on such amendment within 180 days after such request is accepted as complete according to standards which must be prescribed by ordinance of the agency.

(b) The agency shall develop, in cooperation with the States of California and Nevada, environmental threshold carrying capacities for the region. The agency should request the President's Council on Environmental Quality, the U.S. Forest Service and other appropriate agencies to assist in developing such environmental threshold carrying capacities. Within 18 months after the effective date of the amendments to this compact, the

agency shall adopt environmental threshold carrying capacities for the region.

(c) Within 1 year after the adoption of the environmental threshold carrying capacities for the region, the agency shall amend the regional plan so that, at a minimum, the plan and all of its elements, as implemented through agency ordinances, rules and regulations, achieves and maintains the adopted environmental threshold carrying capacities. Each element of the plan shall contain implementation provisions and time schedules for such implementation by ordinance. The planning commission and governing body shall continuously review and maintain the regional plan. The regional plan shall consist of a diagram, or diagrams, and text, or texts setting forth the projects and proposals for implementation of the regional plan, a description of the needs and goals of the region and a statement of the policies, standards and elements of the regional plan.

The regional plan shall be a single enforceable plan and includes all of the following correlated elements:

(1) A land-use plan for the integrated arrangement and general location and extent of, and the criteria and standards for, the uses of land, water, air, space and other natural resources within the region, including but not limited to an indication or allocation of maximum population densities and permitted uses.

(2) A transportation plan for the integrated development of a regional system of transportation, including but not limited to parkways, highways, transportation facilities, transit routes, waterways, navigation facilities, public transportation facilities,

bicycle facilities, and appurtenant terminals and facilities for the movement of people and goods within the region. The goal of transportation planning shall be:

(A) To reduce dependency on the automobile by making more effective use of existing transportation modes and of public transit to move people and goods within the region; and

(B) To reduce to the extent feasible air pollution which is caused by motor vehicles.

Where increases in capacity are required, the agency shall give preference to providing such capacity through public transportation and public programs and projects related to transportation. The agency shall review and consider all existing transportation plans in preparing its regional transportation plan pursuant to this paragraph.

The plan shall provide for an appropriate transit system for the region.

The plan shall give consideration to:

(A) Completion of the Loop Road in the States of Nevada and California;

(B) Utilization of a light rail mass transit system in the South Shore area; and

(C) Utilization of a transit terminal in the Kingsbury Grade area.

Until the regional plan is revised, or a new transportation plan is adopted in accordance with this paragraph, the agency has no effective transportation plan.

(3) A conservation plan for the preservation, development, utilization, and management of the

scenic and other natural resources within the basin, including but not limited to, soils, shoreline and submerged lands, scenic corridors along transportation routes, open spaces, recreational and historical facilities.

(4) A recreational plan for the development, utilization, and management of the recreational resources of the region, including but not limited to, wilderness and forested lands, parks and parkways, riding and hiking trails, beaches and playgrounds, marinas, areas for skiing and other recreational facilities.

(5) A public services and facilities plan for the general location, scale and provision of public services and facilities, which, by the nature of their function, size, extent and other characteristics are necessary or appropriate for inclusion in the regional plan.

In formulating and maintaining the regional plan, the planning commission and governing body shall take account of and shall seek to harmonize the needs of the region as a whole, the plans of the counties and cities within the region, the plans and planning activities of the State, Federal and other public agencies and nongovernmental agencies and organizations which affect or are concerned with planning and development within the region.

(d) The regional plan shall provide for attaining and maintaining Federal State, or local air and water quality standards, whichever are strictest, in the respective portions of the region for which the standards are applicable.

The agency may, however, adopt air or water quality standards or control measures more stringent than the applicable State implementation plan or the applicable

Federal State, or local standards for the region, if it finds that such additional standards or control measures are necessary to achieve the purposes of this compact. Each element of the regional plan, where applicable, shall, by ordinance, identify the means and time schedule by which air and water quality standards will be attained.

(e) Except for the Regional Transportation Plan of the California Tahoe Regional Planning Agency, the regional plan, ordinances, rules and regulations adopted by the California Tahoe Regional Planning Agency in effect on July 1, 1980, shall be the regional plan, ordinances, rules and regulations of the Tahoe Regional Planning Agency for that portion of the Tahoe region located in the State of California. Such plan, ordinance, rule or regulation may be amended or repealed by the governing body of the agency. The plans, ordinances, rules and regulations of the Tahoe Regional Planning Agency that do not conflict with, or are not addressed by, the California Tahoe Regional Planning Agency's plans, ordinances, rules and regulations referred to in this subdivision shall continue to be applicable unless amended or repealed by the governing body of the agency. No provision of the regional plan, ordinances, rules and regulations of the California Tahoe Regional Planning Agency referred to in this subdivision shall apply to that portion of the region within the State of Nevada, unless such provision is adopted for the Nevada portion of the region by the governing body of the agency.

(f) The regional plan, ordinances, rules and regulations of the Tahoe Regional Planning Agency apply to that portion of the region within the State of Nevada.

(g) The agency shall adopt ordinances prescribing specific written findings that the agency must make prior to approving any project in the region. These findings shall relate to environmental protection and shall insure that the project under review will not adversely affect implementation of the regional plan and will not cause the adopted environmental threshold carrying capacities of the region to be exceeded.

(h) The agency shall maintain the data, maps and other information developed in the course of formulating and administering the regional plan, in a form suitable to assure a consistent view of developmental trends and other relevant information for the availability of a use by other agencies of government and by private organizations and individuals concerned.

(i) Where necessary for the realization of the regional plan, the agency may engage in collaborative planning with local governmental jurisdictions located outside the region, but contiguous to its boundaries. In formulating and implementing the regional plan, the agency shall seek the cooperation and consider the recommendations of counties and cities and other agencies of local government, of State and Federal agencies, of educational institutions and research organizations, whether public or private, and of civic groups and private persons.

Article VI. – Agency's Powers

(a) The governing body shall adopt all necessary ordinances, rules, and regulations to effectuate the adopted regional plan. Except as otherwise provided in this compact, every such ordinance, rule or regulation shall establish a minimum standard applicable throughout the region. Any political subdivision or public agency may adopt and enforce an equal or higher requirement applicable to the same subject of regulation in its territory. The regulations of the agency shall contain standards including but not limited to the following: Water purity and clarity; subdivision; zoning; tree removal; solid waste disposal; sewage disposal; land fills, excavations, cuts and grading; piers, harbors, breakwaters or channels and other shoreline developments; waste disposal in shoreline areas; waste disposal from boats; mobile-home parks; house relocation; outdoor advertising; flood plain protection; soil and sedimentation control; air pollution; and watershed protection. Whenever possible without diminishing the effectiveness of the regional plan, the ordinances, rules, regulations and policies shall be confined to matters which are general and regional in application, leaving to the jurisdiction of the respective States, counties and cities the enactment of specific and local ordinances, rules, regulations and policies which conform to the regional plan.

The agency shall prescribe by ordinance those activities which it has determined will not have substantial effect on the land, water, air, space or any other natural resources in the region and therefore will be exempt from its review and approval.

Every ordinance adopted by the agency shall be published at least once by title in a newspaper or combination of newspapers whose circulation is general throughout the region. Except an ordinance adopting or amending the regional plan, no ordinance shall become effective until 60 days after its adoption. Immediately after its adoption, a copy of each ordinance shall be transmitted to the governing body of each political subdivision having territory within the region.

(b) No project other than those to be reviewed and approved under the special provisions of subdivisions (d), (e), (f) and (g) may be developed in the region without obtaining the review and approval of the agency and no project may be approved unless it is found to comply with the regional plan and with the ordinances, rules and regulations enacted pursuant to subdivision (a) to effectuate that plan. The agency may approve a project in the region only after making the written findings required by this subdivision or subdivision (g) of article V. Such findings shall be based on substantial evidence in the record.

Before adoption by the agency of the ordinances required in subdivision (g) of article V, the agency may approve a project in the region only after making written findings on the basis of substantial evidence in the record that the project is consistent with the regional plan then in effect and with applicable plans, ordinances, regulations, and standards of Federal and State agencies relating to the protection, maintenance and enhancement of environmental quality in the region.

(c) The legislatures of the States of California and Nevada find that in order to make effective the regional

plan as revised by the agency, it is necessary to halt temporarily works of development in the region which might otherwise absorb the entire capability of the region for further development or direct it out of harmony with the ultimate plan. Subject to the limitation provided in this subdivision, from the effective date of the amendments to this compact until the regional plan is amended pursuant to subdivision (c) of article V, or until May 1, 1983, whichever is earlier:

(1) Except as otherwise provided in this paragraph, no new subdivision, planned unit development, or condominium project may be approved unless a complete tentative map or plan has been approved before the effective date of the amendments to this compact by all agencies having jurisdiction. The subdivision of land owned by a general improvement district, which existed and owned the land before the effective date of the amendments to this compact, may be approved if subdivision of the land is necessary to avoid insolvency of the district.

(2) Except as provided in paragraph (3), no apartment building may be erected unless the required permits for such building have been secured from all agencies having jurisdiction, prior to the effective date of the amendments to this compact.

(3) During each of the calendar years 1980, 1981 and 1982, no city or county may issue building permits which authorize the construction of a greater number of new residential units within the region than were authorized within the region by building permits issued by that city or county during the calendar year 1978. For the period of January through April, 1983, building permits authorizing the construction of no more than one-third of that number

may be issued by each such city or county. For purposes of this paragraph a "residential unit" means either a single family residence or an individual residential unit within a larger building, such as an apartment building, a duplex or a condominium.

The legislatures find the respective numbers of residential units authorized within the region during the calendar year 1978 to be as follows:

1. City of South Lake Tahoe and El Dorado County (combined)	252
2. Placer County	278
3. Carson City	0
4. Douglas County	339
5. Washoe County	739

(4) During each of the calendar years 1980, 1981 and 1982, no city or county may issue building permits which authorize construction of a greater square footage of new commercial buildings within the region than were authorized within the region by building permits for commercial purposes issued by that city or county during the calendar year 1978. For the period of January through April, 1983, building permits authorizing the construction of no more than one-third the amount of that square footage may be issued by each such city or county.

The legislatures find the respective square footages of commercial buildings authorized within the region during calendar year 1978 to be as follows:

1. City of South Lake Tahoe and El Dorado County (combined)	64,324
2. Placer County	23,000
3. Carson City	0
4. Douglas County	57,354
5. Washoe County	50,600

(5) No structure may be erected to house gaming under a nonrestricted license.

(6) No facility for the treatment of sewage may be constructed or enlarged except:

(A) To comply, as ordered by the appropriate State agency for the control of water pollution, with existing limitations of effluent under the Clean Water Act, 33 U.S.C. § 1251 et seq., and the applicable State law for control of water pollution;

(B) To accommodate development which is not prohibited or limited by this subdivision; or

(C) In the case of Douglas County Sewer District #1, to modify or otherwise alter sewage treatment facilities existing on the effective date of the amendments to this compact so that such facilities will be able to treat the total volume of effluent for which they were originally designed, which is 3.0 million gallons per day. Such modification or alteration is not a "project"; is not subject to the requirements of article VII; and does not require a permit from the agency. Before commencing such modification or alteration, however, the district shall submit to the agency its report identifying any significant soil erosion problems which may be caused by such modifications or alterations and the measures which the district proposes to take to mitigate or avoid such problems.

The moratorium imposed by this subdivision does not apply to work done pursuant to a right vested before the effective date of the amendments to this compact. Notwithstanding the expiration date of the moratorium imposed by this subdivision, no new highway may be

built or existing highway widened to accommodate additional continuous lanes for automobiles until the regional transportation plan is revised and adopted.

The moratorium imposed by this subdivision does not apply to the construction of any parking garage which has been approved by the agency prior to May 4, 1979, whether that approval was affirmative or by default. The provisions of this paragraph are not an expression of legislative intent that any such parking garage, the approval of which is the subject of litigation which was pending on the effective ate of the amendments to this compact, should or should not be constructed. The provisions of this paragraph are intended solely to permit construction of such a parking garage if a judgment sustaining the agency's approval to construct that parking garage has become final and no appeal is pending or may lawfully be taken to a higher court.

(d) Subject to the final order of any court of competent jurisdiction entered in litigation contesting the validity of an approval by the Tahoe Regional Planning Agency, whether that approval was affirmative or by default, if that litigation was pending on May 4, 1979, the agency and the States of California and Nevada shall recognize as a permitted and conforming use:

(1) Every structure housing gaming under a nonrestricted license which existed as a licensed gaming establishment on May 4, 1979, or whose construction was approved by the Tahoe Regional Planning Agency affirmatively or deemed approved before that date. The construction or use of any structure to house gaming under a nonrestricted license not so existing or approved, or the enlargement in

cubic volume of any such existing or approved structure is prohibited.

(2) Every other nonrestricted gaming establishment whose use was seasonal and whose license was issued before May 4, 1979, for the same season and for the number and type of games and slot machines on which taxes or fees were paid in the calendar year 1978.

(3) Gaming conducted pursuant to a restricted gaming license issued before May 4, 1979, to the extent permitted by that license on that date.

The area within any structure housing gaming under a nonrestricted license which may be open to public use (as distinct from that devoted to the private use of guests and exclusive of any parking area) is limited to the area existing or approved for public use on May 4, 1979. Within these limits, any external modification of the structure which requires a permit from a local government also requires approval from the agency. The agency shall not permit restaurants, convention facilities, showrooms or other public areas to be constructed elsewhere in the region outside the structure in order to replace areas existing or approved for public use on May 4, 1979.

(e) Any structure housing licensed gaming may be rebuilt or replaced to a size not to exceed the cubic volume, height and land coverage existing or approved on May 4, 1979, without the review or approval of the agency or any planning or regulatory authority of the State of Nevada whose review or approval would be required for a new structure.

(f) The following provisions apply to any internal or external modification, remodeling, change in use, or

repair of a structure housing gaming under a nonrestricted license which is not prohibited by article VI(d):

(1) The agency's review of an external modification of the structure which requires a permit from a local government is limited to determining whether the external modification will do any of the following:

(A) Enlarge the cubic volume of the structure;

(B) Increase the total square footage of area open to one approved for public use on May 4, 1979;

(C) Convert an area devoted to the private use of guests to an area open to public use;

(D) Increase the public area open to public use which is used for gaming beyond the limits contained in paragraph (3); and

(E) Conflict with or be subject to the provisions of any of the agency's ordinances that are generally applicable throughout the region.

The agency shall make this determination within 60 days after the proposal is delivered to the agency in compliance with the agency's rules or regulations governing such delivery unless the applicant has agreed to an extension of this time limit. If an external modification is determined to have any of the effects enumerated in subparagraphs (A) through (C), it is prohibited. If an external modification is determined to have any of the effects enumerated in subparagraph (D) or (E), it is subject to the applicable provisions of this compact. If an external modification is determined to have no such effect, it is not subject to the provisions of this compact.

(2) Except as provided in paragraph (3), internal modification, remodeling, change in use or repair of a structure housing gaming under a nonrestricted license is not a project and does not require the review or approval of the agency.

(3) Internal modification, remodeling, change in use or repair of areas open to public use within a structure housing gaming under a nonrestricted license which alone or in combination with any other such modification, remodeling, change in use or repair will increase the total portion of those areas which is actually used for gaming by more than the product of the total base area, as defined below, in square feet existing on or approved before August 4, 1980, multiplied by 15 percent constitutes a project and is subject to all of the provisions of this compact relating to projects. For purposes of this paragraph and the determination required by article VI(g), base area means all of the area within a structure housing gaming under a nonrestricted license which may be open to public use, wither or not gaming is actually conducted or carried on in that area, except retail stores, convention centers and meeting rooms, administrative offices, kitchens, maintenance and storage areas, rest rooms, engineering and mechanical rooms, accounting rooms and counting rooms.

(g) In order to administer and enforce the provisions of paragraphs (d), (e) and (f), the State of Nevada through its appropriate planning or regulatory agency, shall require the owner or licensee of a structure housing gaming under a nonrestricted license to provide:

(1) Documents containing sufficient information for the Nevada agency to establish the following relative to the structure:

(A) The location of its external walls;

(B) Its total cubic volume;

(C) Within its external walls, the area in square feet open or approved for public use and the area in square feet devoted to or approved for the private use of guests on May 4, 1979;

(D) The amount of surface area of land under the structure; and

(E) The base area as defined in paragraph (f)(3) in square feet existing on or approved before August 4, 1980.

(2) An informational report whenever any internal modification, remodeling, change in use, or repair will increase the total portion of the areas open to public use which is used for gaming.

The Nevada agency shall transmit this information to the Tahoe Regional Planning Agency.

(h) Gaming conducted pursuant to a restricted gaming license is exempt from review by the agency if it is incidental to the primary use of the premises.

(i) The provisions of subdivisions (d) and (e) are intended only to limit gaming and related activities as conducted within a gaming establishment, or construction designed to permit the enlargement of such activities, and not to limit any other use of property zoned for commercial use or the accommodation of tourists, as approved by the agency.

(j) Legal actions arising out of or alleging a violation of the provisions of this compact, of the regional plan or of an ordinance or regulation of the agency or of a

permit or a condition of a permit issued by the agency are governed by the following provisions:

(1) This subdivision applies to:

(A) Actions arising out of activities directly undertaken by the agency.

(B) Actions arising out of the issuance to a person of a lease, permit, license or other entitlement for use by the agency.

(C) Actions arising out of any other act or failure to act by any person or public agency.

Such legal actions may be filed and the provisions of this subdivision apply equally in the appropriate courts of California and Nevada and of the United States.

(2) Venue lies:

(A) If a civil or criminal action challenges an activity by the agency or any person which is undertaken or to be undertaken upon a parcel of real property, in the State or Federal judicial district where the real property is situated.

(B) If an action challenges an activity which does not involve a specific parcel of land (such as an action challenging an ordinance of the agency), in any State or Federal court having jurisdiction within the region.

(3) Any aggrieved person may file an action in an appropriate court of the States of California or Nevada or of the United States alleging noncompliance with the provisions of this compact or with an ordinance or regulation of the agency. In the case of governmental agencies, "aggrieved person" means the Tahoe Regional Planning Agency or any State,

Federal or local agency. In the case of any person other than a governmental agency who challenges an action of the Tahoe Regional Planning Agency, "aggrieved person" means any person who has appeared, either in person, through an authorized representative, or in writing, before the agency at an appropriate administrative hearing to register objection to the action which is being challenged, or who had good cause for not making such an appearance.

(4) A legal action arising out of the adoption or amendment of the regional plan or of any ordinance or regulation of the agency, or out of the granting or denial of any permit, shall be commenced within 60 days after final action by the agency. All other legal actions shall be commenced within 65 days after discovery of the cause of action.

(5) In any legal action filed pursuant to this subdivision which challenges an adjudicatory act or decision of the agency to approve or disapprove a project, the scope of judicial inquiry shall extend only to whether there was prejudicial abuse of discretion. Prejudicial abuse of discretion is established if the agency has not proceeded in a manner required by law or if the act or decision of the agency was not supported by substantial evidence in light of the whole record. In making such a determination the court shall not exercise its independent judgment on evidence but shall only determine whether the act or decision was supported by substantial evidence in light of the whole record. In any legal action filed pursuant to this subdivision which challenges a legislative act or decision of the agency (such as the adoption of the regional plan and the enactment of implementing ordinances), the scope of the judicial inquiry shall extend only to the questions of whether the act or decision has been arbitrary, capricious or

lacking substantial evidentiary support or whether the agency has failed to proceed in a manner required by law.

(6) The provisions of this subdivision do not apply to any legal proceeding pending on the date when this subdivision becomes effective. Any such legal proceeding shall be conducted and concluded under the provisions of law which were applicable prior to the effective date of this subdivision.

(7) The security required for the issuance of a temporary restraining order or preliminary injunction based upon an alleged violation of this compact or any ordinance, plan, rule or regulation adopted pursuant thereto is governed by the rule or statute applicable to the court in which the action is brought, unless the action is brought by a public agency or political subdivision to enforce its own rules, regulations and ordinances in which case no security shall be required.

(k) The agency shall monitor activities in the region and may bring enforcement actions in the region to ensure compliance with the regional plan and adopted ordinances, rules, regulations and policies. It if is found that the regional plan, or ordinances, rules, regulations and policies are not being enforced by a local jurisdiction, the agency may bring action in a court of competent jurisdiction to insure compliance.

(l) Any person who violates any provision of this compact or of any ordinance or regulation of the agency or of any condition of approval imposed by the agency is subject to a civil penalty not to exceed $5,000. Any such person is subject to an additional civil penalty not to exceed $5,000 per day, for each day on which such a

violation persists. In imposing the penalties authorized by this subdivision, the court shall consider the nature of the violation and shall impose a greater penalty if it was willful or resulted from gross negligence than if it resulted from inadvertence or simple negligence.

(m) The agency is hereby empowered to initiate, negotiate and participate in contracts and agreements among the local governmental authorities of the region, or any other intergovernmental contracts or agreements authorized by State or Federal law.

(n) Each intergovernmental contract or agreement shall provide for its own funding and staffing, but this shall not preclude financial contributions from the local authorities concerned or from supplementary sources.

(o) Every record of the agency, whether public or not, shall be open for examination to the legislature and controller of the State of California and the legislative auditor of the State of Nevada.

(p) Approval by the agency of any project expires 3 years after the date of final action by the agency or the effective date of the amendments to this compact, whichever is late, unless construction is begun within that time and diligently pursued thereafter or the use or activity has commenced. In computing the 3-year period any period of time during which the project is the subject of a legal action which delays or renders impossible the diligent pursuit of that project shall not be counted. Any license, permit or certificate issued by the agency which has an expiration date shall be extended by that period of time during which the project is the subject of such legal action as provided in this subdivision.

(q) The governing body shall maintain a current list of real property known to be available for exchange with the United States or with other owners of real property in order to facilitate exchanges of real property by owners of real property in the region.

ARTICLE VII. – ENVIRONMENTAL IMPACT STATEMENTS

(a) The Tahoe Regional Planning Agency when acting upon matters that have a significant effect on the environment shall:

(1) Utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(2) Prepare and consider a detailed environmental impact statement before deciding to approve or carry out any project. The detailed environmental impact statement shall include the following:

(A) The significant environmental impacts of the proposed project;

(B) Any significant adverse environmental effects which cannot be avoided should the project be implemented;

(C) Alternatives to the proposed project;

(D) Mitigation measures which must be implemented to assure meeting standards of the region;

(E) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity;

(F) Any significant irreversible and irretrievable commitments of resources which would be involved in the proposed project should it be implemented; and

(G) The growth-inducing impact of the proposed project;

(3) Study, develop and describe appropriate alternatives to recommended courses of action for any project which involves unresolved conflicts concerning alternative uses of available resources;

(4) Make available to States, counties, municipalities, institutions and individuals, advice and information useful in restoring, maintaining and enhancing the quality of the region's environment; and

(5) Initiate and utilize ecological information in the planning and development of resource-oriented projects.

(b) Prior to completing an environmental impact statement, the agency shall consult with and obtain the comments of any Federal, State or local agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State and local agencies which are authorized to develop and enforce environmental standards shall be made available to the public and shall accompany the project through the review processes. The public shall be consulted during the environmental impact statement process and views shall be solicited during a public comment period not to be less than 60 days.

(c) Any environmental impact statement required pursuant to this article need not repeat in its entirety any information or data which is relevant to such a statement and is a matter of public record or is generally available to the public, such as information contained in an environmental impact report prepared pursuant to the California Environmental Quality Act or a Federal environmental impact statement prepared pursuant to the National Environmental Policy Act of 1969. However, such information or data shall be briefly described in the environmental impact statement and its relationship to the environmental impact statement shall be indicated.

In addition, any person may submit information relative to a proposed project which may be included, in whole or in part, in any environmental impact statement required by this article.

(d) In addition to the written findings specified by agency ordinance to implement the regional plan, the agency shall make either of the following written findings before approving a project for which an environmental impact statement was prepared:

(1) Changes or alterations have been required in or incorporated into such project which avoid or reduce the significant adverse environmental effects to a less than significant level; or

(2) Specific considerations, such as economic, social or technical, make infeasible the mitigation measures or project alternatives discussed in the environmental impact statement on the project.

A separate written finding shall be made for each significant effect identified in the environmental impact statement on the project. All written findings must be supported by substantial evidence in the record.

(e) The agency may charge and collect a reasonable fee from any person proposing a project subject to the provisions of this compact in order to recover the estimated costs incurred by the agency in preparing an environmental impact statement under this article.

(f) The agency shall adopt by ordinance a list of classes of projects which the agency has determined will not have a significant effect on the environment and therefore will be exempt from the requirement for the preparation of an environmental impact statement under this article. Prior to adopting the list, the agency shall make a written finding supported by substantial evidence in the record that each class of projects will not have a significant effect on the environment.

Article VIII. – Finances

(a) On or before September 30 of each calendar year the agency shall establish the amount of money necessary to support its activities for the next succeeding fiscal year commencing July 1 of the following year. The agency shall apportion $75,000 of this amount among the counties within the region on the same ratio to the total sum required as the full cash valuation of taxable property within the region in each county bears to the total full cash valuation of taxable property within the region. In addition, each county within the region in California shall pay $18,750 to the agency and each county within

the region in Nevada, including Carson City, shall pay $12,500 to the agency, from any funds available therefor. The State of California and the State of Nevada may pay to the agency by July 1 of each year any additional sums necessary to support the operations of the agency pursuant to this compact. If additional funds are required, the agency shall make a request for the funds to the States of California and Nevada. Requests for State funds must be apportioned two-thirds from California and one-third from Nevada. Money appropriated shall be paid within 30 days.

(b) The agency may fix and collect reasonable fees for any services rendered by it.

(c) The agency shall submit an itemized budget to the States for review with any request for State funds, shall be strictly accountable to any county in the region and the States for all funds paid by them to the agency and shall be strictly accountable to all participating bodies for all receipts and disbursement.

(d) The agency is authorized to receive gifts, donations, subventions, grants, and other financial aids and funds; but the agency may not own land except as provided in subdivision (i) of article III.

(e) The agency shall not obligate itself beyond the moneys due under this article for its support from the several counties and the States for the current fiscal year, plus any moneys on hand or irrevocably pledged to its support from other sources No obligation contracted by the agency shall bind either of the party States or any political subdivision thereof.

ARTICLE IX. – TRANSPORTATION DISTRICT

(a) The Tahoe transportation district is hereby established as a special purpose district. The boundaries of the district are coterminous with those of the region.

(b) The business of the district shall be managed by a board of directors consisting of:

(1) One member of the county board of supervisors of each of the counties of El Dorado and Placer;

(2) One member of the city council of the city of South Lake Tahoe;

(3) One member each of the board of county commissioners of Douglas County and of Washoe County;

(4) One member of the board of supervisors of Carson City;

(5) The director of the California Department of Transportation; and

(6) The director of the department of transportation of the State of Nevada.

Any director may designate an alternate.

(c) The vote of at least five of the directors must agree to take action. If at least five votes in favor of an action are not cast, an action of rejection shall be deemed to have been taken.

(d) The Tahoe transportation district may in accordance with the adopted transportation plan:

(1) Own and operate a public transportation system to the exclusion of all other publicly owned transportation systems in the region.

(2) Acquire upon mutually agreeable terms any public transportation system or facility owned by a county, city or special purpose district within the region.

(3) Hire the employees of existing public transportation systems that are acquired by the district without loss of benefits to the employees, bargain collectively with employee organizations, and extend pension and other collateral benefits to employees.

(4) Fix the rates and charges for transit services provided pursuant to this subdivision.

(5) Issue revenue bonds and other evidence of indebtedness.

(6) By resolution, determine and propose for adoption a tax for the purpose of obtaining services of the district. The tax proposed must be general and of uniform operation throughout the region and may not be graduated in any way. the district is prohibited from imposing an ad valorem tax, a tax measured by gross or net receipts on business, a tax or charge that is assessed against people or vehicles as they enter or leave the region, and any tax, direct or indirect, on gaming tables and devices.

Any such proposition must be submitted to the voters of the district and shall become effective upon approval of two-thirds of the voters voting on the proposition. The revenues from any such tax must be used for the service for which it was imposed, and for no other purpose.

(7) Provide service from inside the region to convenient airport, railroad and interstate bus terminals without regard to the boundaries of the region.

(e) The legislatures of the States of California and Nevada may, by substantively identical enactments, amend this article.

ARTICLE X. – MISCELLANEOUS

(a) It is intended that the provisions of this compact shall be reasonably and liberally construed to effectuate the purposes thereof. Except as provided in subdivision (c), the provisions of this compact shall be severable and if any phrase, clause, sentence or provision of this compact is declared to be contrary to the constitution of any participating State or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this compact shall be held contrary to the constitution of any State participating therein, the compact shall remain in full force and effect as to the remaining State and in full force and effect as to the State affected as to all severable matters.

(b) The agency shall have such additional powers and duties as may hereafter be delegated or imposed upon it from time to time by the action of the legislature of either State concurred in by the legislature of the other.

(c) A State party to this compact may withdraw therefrom by enacting a statute repealing the compact. Notice of withdrawal shall be communicated officially and in writing to the Governor of the other State and to the agency administrators. This provision is not severable, and if it is held to be unconstitutional or invalid, no

other provision of this compact shall be binding upon the State of Nevada or the State of California.

(d) No provision of this compact shall have any effect upon the allocation, distribution or storage or interstate waters or upon any appropriative water right.

SEC. 2. The Secretary of Agriculture and the heads of other appropriate agencies are authorized, upon the request of the Tahoe Regional Planning Agency, to cooperate with the Tahoe Regional Planning Agency in all respects compatible with carrying out the normal duties of their agencies.

SEC. 3. The consent to the compact by the United States is subject to the condition that the President may appoint a nonvoting representative of the United States to the governing body of the Tahoe Regional Planning Agency.

SEC. 4. Any additional powers conferred on the agency pursuant to article X, section 1(b) of the compact shall not be exercised unless consented to by the Congress.

SEC. 5. Nothing contained in this Act or in the compact consented to shall in any way affect the powers, rights, or obligations of the United States, or the applicability of any law or regulation of the United States in, over or to the region or waters which are the subject of the compact, or in any way affect rights owned or held by or for Indians or Indian tribes subject to the jurisdiction of the United States.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

PLAINTIFFS' EXHIBIT 7

TAHOE REGIONAL PLANNING AGENCY
RESOLUTION NO. 81-5

WHEREAS Public Law 96-551, 94 Stat. 3233, signed by the President of the United States on December 19, 1980, revises the bi-state compact establishing the Tahoe Regional Planning Agency (TRPA) and mandates that this body devise a single, enforceable plan for the regulation of development in the Lake Tahoe Basin;

AND WHEREAS the waters of Lake Tahoe and other resources of the region constitute unique and irreplaceable resources which are threatened with deterioration and degeneration;

AND WHEREAS preserving and enhancing the quality of such waters and resources is a matter of national policy;

AND WHEREAS the experience of this body is that a program providing public funds for the acquisition of environmentally sensitive lands in the Lake Tahoe Basin is a vital and necessary part of the efforts to effectuate that policy;

AND WHEREAS an acquisition program administered by appropriate governmental authority is necessary to prevent hardship to affected private landowners in the Lake Tahoe Basin;

AND WHEREAS an ongoing acquisition program will enable this body to better utilize its resources and

direct its efforts toward development and administration of a plan for the Lake Tahoe Basin pursuant to Public Law 96-551;

NOW THEREFORE BE IT RESOLVED that this body unanimously urges authorization of the maximum possible funding resources at the earliest possible time;

BE IT FURTHER RESOLVED that a copy of this resolution be transmitted to the President of the United States, to the Governors of the States of Nevada and California, to the Federal and State legislative delegations, and to all appropriate Federal, State and regional entities.

UNANIMOUSLY PASSED AND ADOPTED this twenty-eighth day of May, 1981 by the Governing Body of the Tahoe Regional Planning Agency.

Dated: _____, 1981

By: s/
Roland D. Westergard, Chairman
Tahoe Regional Planning Agency

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

PLAINTIFF'S EXHIBIT 51

TRPA REGULAR MEETING MINUTES
NOVEMBER 17, 1983

The October financial statement is in the packet and is recommended for approval by the Finance Committee. Additionally, a memo from Sandy McAdler, Agency Finance Director, sets forth the procedure for handling of securities relating to projects. One of five different option is to post cash bonds, and TRPA is currently holding approximately $250,000 worth of securities in the form of cash deposits which require extensive staff administration in keeping track of interest on the individual accounts. Staff recommends retention of approximately $50,000 in passbook savings to cover demands against security refunds, with the remainder be invested at a higher rate (9.8% annually). It is recommended that the difference between the 5¼% now being earned (refunded to the person posting the security) and the 9.8% be taken as an administrative fee. Those persons posting the cash bond would still earn the same amount of interest they previously earned.

MOTION by Mr. Stewart to approve the Finance Committee recommendations on the October financial statement and on the handling of an administrative fees for cash securities. The motion carried unanimously.

B. Litigation Committee

Mr. Midkiff advised the Board that, pursuant to an agreement between TRPA's Litigation Committee and the

Lahontan Regional Board, a packet of information regarding the Brockway suit had been prepared. Staff counsel is preparing an additional memorandum regarding the vested rights issue. A meeting will be held with the Lahontan Board on or before its December 8 meeting to discuss that presentation and any questions they may have on that particular suit. Mr. Heikka directed that nothing be agreed to until there is full Board determination on the matter.

F. Governing Body Members

Mr. Sevison asked about the status of permits issued under last year's allocation. Staff advised these would be dealt with under the adopting ordinance but proposed language could be made available to the Board members now with further discussion to be scheduled for the December agenda. Mr. Sevison explained that at the end of the year the allocation period ends. Staff advised that a memo had been mailed to the Board summarizing the issues and options available in this regard. Staff counsel has advised that, because these applications were not on file with TRPA at the effective date of the moratorium, these would have to be handled under the new Plan. They are, however, in a situation where they could be considered the 1983 allocation in that these were projects which could not proceed in El Dorado and Placer Counties because of the fact that they had to go through an allocation system. Mr. Sevison asked that, in fairness to these applicants, these applications be allowed to proceed with review under existing standards even though final approval cannot be granted. Mr. Midkiff advised that there is a legal problem with using existing standards.

Chairman Reed directed that this matter be placed on the December agenda for a determination.

XI RESOLUTIONS

Consideration of Amendments to Resolution 83-21 or Other Resolutions Relating Thereto

Mr. Midkiff reminded the Board that the expiration of the prohibition from accepting or approving applications as set forth in Resolution 83-21 expires November 26, 1983. The conditions that led to adoption of that prohibition, however, continue in place, since TRPA does not have an amended Regional Plan and the required findings cannot be made with regard to projects. Staff requests that the Board give direction to staff on how to handle the many inquiries which will be coming in the next few days. In the absence of Board direction, staff will continue the moratorium. No action was taken.

XII PENDING MATTERS – none

XIII ADJOURNMENT – The meeting adjourned at 5:00 p.m.

This meeting was taped in its entirety. Anyone wishing to listen to the tapes may call (916) 541-0246.

Respectfully submitted,

/s/ Julie D. Frame
Julie D. Frame
Administrative Assistant

Approved as submitted on December 21, 1983

JOHNSON-PERKINS & ASSOCIATES, INC.
REAL ESTATE APPRAISERS & CONSULTANTS

COMPARABLE NEVADA LOW CAPABILTY LAND SALES CHART
Table A

Sale Number	Property Identification A.P.N.	Sale Date	Total Land Area/Land Coverage	Soil Capability Level/IPES Score	Sale Price
NV-1	Douglas County, Nevada 05-312-08	09-84	11,909± s.f./ 119± s.f.	2 NA	$ 42,000
NV-2	Douglas County, Nevada 11-112-05	09-84	16,149± s.f./ 161± s.f.	1a NA	$6,000
NV-3	Douglas County, Nevada 07-324-04	07-84	13,933± s.f./ 139± s.f.	1a, 2 NA	$10,600
NV-4	Douglas County, Nevada 03-172-10	02-84	16,990± s.f./ 170± s.f.	1a, 2 NA	$95,000
NV-5	Douglas County, Nevada 03-130-02	10-85	15,935± s.f./ 159± s.f.	1a NA	$45,000
NV-6	Douglas County, Nevada 03-130-01	10-85	16,012± s.f./ 160± s.f.	1a NA	$45,000
NV-7	Washoe County, Nevada 125-192-04	04-84	38,990± s.f./ 390± s.f.	1a NA	$40,000
NV-8	Washoe County, Nevada 125-253-02	03-86	6,826± s.f./ 341± s.f.	3 NA	$18,000

JOHNSON-PERKINS & ASSOCIATES, INC.
REAL ESTATE APPRAISERS & CONSULTANTS

COMPARABLE CALIFORNIA LOW CAPABILTY LAND SALES CHART
Table B

Sale Number	Property Identification A.P.N.	Sale Date	Total Land Area/Land Coverage	Soil Capability Level/ IPES Score	Sale Price
CA-1	Rubicon Bay, California 16-481-13	01-81	10,560± s.f./ 106± s.f.	1a 600	$18,415
CA-2	Meeks Bay, California 16-091-08	05-81	10,625± s.f./ 106± s.f.	1a 736	$15,000
CA-3	West Shore, California 16-544-04	03-84	17,370± s.f./ 174± s.f.	1a 707	$10,750
CA-4	Alpine Peaks, California 83-430-04	06-84	15,300± s.f./ 153± s.f.	3 450	$10,500
CA-5	West Shore, California 16-052-04	05-86	5,700± s.f./ 627± s.f.	1a 659	$10,000

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

DEFENDANTS' EXHIBIT 81

COMPARABLE GREENBELT LAND SALES CHART
NEVADA TAHOE BASIN ACT
Table No. F

Sale Number	A.P.N. Location	Land Area	Sale Date	Sale Price
GBS-1	131-080-33 Incline Village, Washoe County	21,432± s.f.	3-23-90	$40,000
GBS-2	125-503-13 Incline Village, Washoe County	6,970± s.f.	02-05-91	$ 9,000
GBS-3	125-163-27 Incline Village, Washoe County	10,150± s.f.	04-08-91	$ 7,125
GBS-4	123-161-07 Crystal Bay, Washoe County	16,117± s.f.	06-21-91	$18,750
GBS-5	123-161-09 Crystal Bay, Washoe County	14,375± s.f.	06-21-91	$16,750
GBS-6	123-161-28 Crystal Bay, Washoe County	11,800± s.f.	06-21-91	$72,500
GBS-7	123-163-03 Crystal Bay, Washoe County	6,752± s.f.	07-17-91	$10,000
GBS-8	123-161-13 Crystal Bay, Washoe County	20,038± s.f.	12-12-91	$16,000
GBS-9	05-181-28 Zephyr Heights, Douglas County	9,839± s.f.	03-03-93	$13,000
GBS-10	125-503-23 Incline Village, Washoe County	8,712± s.f.	05-24-95	$15,000
GBS-11	125-156-02 Incline Village, Washoe County	12,953± s.f.	08-14-95	$12,500
GBS-12	122- 114-03 Incline Village, Washoe County	17,440± s.f.	10-11-95	$15,000

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

DEFENDANTS' EXHIBIT 82

COMPARABLE SEZ LOT SALES CHART
Table G

Sale Number	A.P.N. Location	Parcel Size	Sale Date	Sale Price
SEZ-1	83-450-29 Alpine Peaks, Placer County, CA	10,000± s.f.	06-27-84	$12,000
SEZ-2	33-233-06 Country Club Heights El Dorado County, CA	10,800± s.f.	06-27-88	$6,000
SEZ-3	33-751-06 Country Club Heights El Dorado County, CA	9,600± s.f.	09-28-87	$5,000
SEZ-4	14-242-11 & 12 Kailua Park El Dorado County, CA	20,000± s.f.	01-05-90	$13,000
SEZ-5	128-060-05 Incline Village Washoe County, NV	9,148± s.f.	06-11-81	$42,500
SEZ-6	131-261-11 Incline Village Washoe County, NV	30,492± s.f.	01-07-82	$110,000
SEZ-7	07-243-03 Middle Kingsbury Douglas County, NV	12,632± s.f.	Offer 04-01-82	$11,500

JOHNSON-PERKINS & ASSOCIATES, INC.
REAL ESTATE APPRAISERS & CONSULTANTS
Reno ■ Lake Tahoe

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

DEFENDANTS' EXHIBIT 244

ATTACHMENT C

TAHOE REGIONAL PLANNING AGENCY

RESOLUTION NO. 82 - 11

RESOLUTION OF THE GOVERNING BODY OF THE TAHOE REGIONAL PLANNING AGENCY ADOPTING ENVIRONMENTAL THRESHOLD CARRYING CAPACITIES FOR THE LAKE TAHOE REGION

WHEREAS, the Governing Body of the Tahoe Regional Planning Agency ("TRPA") finds:

1. On December 19, 1980 the Tahoe Regional Planning Compact ("Compact") was amended, requiring, among other things, that the TRPA adopt Environmental Threshold Carrying Capacities for the Lake Tahoe Region. The Compact further requires that, within one (1) year after the adoption of the Environmental Threshold Carrying Capacities TRPA shall amend its regional plan so that, at a minimum, the plan and all of its elements, as implemented through Agency ordinances, rules and regulations, achieves and maintains the adopted Environmental Threshold Carrying Capacities.

2. The Compact finds, among other things, that: (a) the waters of Lake Tahoe and other resources of the Lake Tahoe Region are threatened with deterioration or degeneration; (b) said region exhibits unique environmental and ecological values; (c) said region is experiencing

problems of resource use and deficiencies of environmental control; (d) increasing urbanization is threatening the ecological values of said region; (e) maintenance of the social and economic health of the region depends on maintaining the significant scenic, recreational, educational, scientific, natural and public health values provided by said region; (f) there is a public interest in protecting, preserving and enhancing said values for the residents of and visitors to said region; (g) in order to preserve the scenic beauty and outdoor recreational opportunities of said region, there is a need to insure an equilibrium between said region's natural endowment and its man-made environment; and (h) it is imperative that there be established a TRPA with the powers, among others, to establish Environmental Threshold Carrying Capacities and to adopt and enforce a regional plan and implementing ordinances which will achieve and maintain such capacities while providing opportunities for orderly growth and development consistent therewith.

3. The Compact defines "environmental threshold carrying capacity" as "an environmental standard necessary to maintain a significant scenic, recreational, educational, scientific or natural value of the region or to maintain public health and safety within the region".

4. Although not required to do so by the Compact, the Governing Body and Advisory Planning Commission of the TRPA, prior to the adoption of this resolution, conducted duly-noticed public hearings, at which hearings considerable oral testimony and documentary evidence were received and considered by the Governing Body and Advisory Planning Commission. Evidence in the record of said hearings, which evidence is hereby

determined substantial, established that each of the Environmental Threshold Carrying Capacities adopted by this resolution is necessary to maintain a significant scenic, recreational, educational, scientific or natural value of the Lake Tahoe Region or to maintain public health and safety within the region.

5. The Environmental Threshold Carrying Capacities adopted hereby comply in all respects, procedural and substantive, with the Compact, as amended, and are necessary to effectuate and implement the same.

6. In addition to other evidence received at said public hearings, the Governing Body of the TRPA, prior to the adoption of this resolution, has received for the administrative record and had opportunity to review, a lengthy, detailed study report concerning the Environmental Threshold Carrying Capacities, which report was prepared by TRPA staff and consultants and substantiates the Environmental Threshold Carrying Capacities adopted hereby.

7. The Environmental Threshold Carrying Capacities adopted by this resolution were the subject of an environmental impact statement ("EIS"), which was prepared, considered, circulated, certified and otherwise processed, reviewed and approved by the TRPA in accordance with the substantive and procedural provisions of Article VII of the Compact. Without limiting the generality of the foregoing, the Governing Body further finds that the said EIS contained the information required by Article VII(a)(2) of the Compact and provided the Governing Body substantial information upon which it could

base a reasoned review and evaluation of the environmental impacts of the Environmental Threshold Carrying Capacities adopted by this resolution. The Governing Body further finds that, prior to approving this resolution, it made the alternative written findings required by Article VII(d) of the Compact, a separate written finding having been made for each significant effect identified in the EIS as resulting from the Environmental Threshold Carrying Capacities adopted hereby. The Governing Body further finds that said written findings are supported by substantial evidence in the record.

8. Pursuant to Article II(i) of the Compact, Environmental Threshold Carrying Capacities are to include, but not be limited to, standards for air quality, water quality, soil conservation, vegetation preservation and noise, thus permitting, if not requiring, the adoption of standards for other elements necessary to maintain a significant scenic, recreational, educational, scientific or natural value of the Lake Tahoe Region or to maintain public health and safety within the region.

9. In certain instances it was not reasonably possible or feasible to set forth Environmental Threshold Carrying Capacities as numerical standards, requiring in such instances that standards be set forth as management standards. The Governing Body further finds that the inability to set forth a numerical standard for a particular Environmental Threshold Carrying Capacity does not render such Environmental Threshold Carrying Capacity improper or inappropriate for adoption under the Compact. In association with adoption of Environmental Threshold Carrying Capacities, the Governing Body is adopting policy statements that will provide specific

direction for Agency staff in development of the regional plan. It is the intent of the Governing Body that amendment or repeal of the Policy Statements shall be subject to the dual-majority voting provisions of Article III(g)(1) of the Compact.

10. The definition of "environmental threshold carrying capacity" set forth in Article II(i) of the Compact requires an exercise of discretion by the Governing Body in setting a standard "necessary to maintain a significant scenic, recreational, educational, scientific or natural value of the region or to maintain public health and safety within the region". In approving this resolution, the Governing Body of the TRPA recognizes that it must amend the TRPA regional plan so that, at a minimum, the plan and all of its elements, as implemented through TRPA ordinances, rules and regulations, achieves and maintains the adopted Environmental Threshold Carrying Capacities. The Governing Body further recognizes that it is required under Article V(d) of the Compact to adopt a regional plan attaining and maintaining federal, state, or local air and water quality standards, whichever are strictest, in the respective portions of the Lake Tahoe Region for which such standards are applicable.

11. The Environmental Threshold Carrying Capacities adopted by this resolution are to be achieved and maintained through implementation of TRPA's regional plan. The Governing Body further finds, however, that said Environmental Threshold Carrying Capacities, as achieved and maintained through implementation of TrRPA's [sic] regional plan, may be achieved and maintained pursuant to an orderly time schedule adopted for that purpose.

12. In adopting this resolution, the TRPA Governing Body expressly recognizes that there is a distinction between adoption of Environmental Threshold Carrying Capacities and the subsequent planning process resulting in an amended regional plan so that, at a minimum, the plan and all of its elements achieves and maintains the adopted Environmental Threshold Carrying Capacities.

13. Inasmuch as the Compact specifies no particular method for the adoption of Environmental Threshold Carrying Capacities, this resolution is a proper method for the adoption thereof.

14. The Governing Body recognizes that, in adoption of Environmental Threshold Carrying Capacities, it is establishing standards for the Lake Tahoe Region which must be carried out through the regional plan and that its jurisdiction to achieve and maintain those standards is limited to the Lake Tahoe Region.

15. The Governing Body recognizes that, in establishing Environmental Threshold Carrying Capacities for the Lake Tahoe Region, it is establishing the basis for a long-term program which will protect and enhance the significant environmental values of the region, which program will be reviewed from time to time to ensure its consistency with the currently available scientific evidence and technical and other information. Attainment of the Environmental Threshold Carrying Capacities prior to the dates scheduled in the regional plan, while beneficial, is not required.

16. The Governing Body recognizes that the Tahoe Regional Planning Compact, as amended, provides for

the adoption of an orderly program to attain the environmental standards through the development of its regional plan, including time schedules for implementation of specific measures necessary to attain those standards and that an immediate or short-range demonstration of attainment of some standards is physically impossible.

17. The Governing Body recognizes and respects the legislative intent of the States of Nevada and California and the United States Congress in entering into and approving the Tahoe Regional Planning Compact, as amended.

18. The Governing Body recognizes that the degree of success in attaining and maintaining the Environmental Threshold Carrying Capacities depends upon a program of mutual cooperation among the two states, local governmental entities, the Federal Government and the private sector in implementing its regional plan.

NOW, THEREFORE, BE IT RESOLVED by the Governing Body of the Tahoe Regional Planning Agency as follows:

1. That the Governing Body will develop its regional plan, recognizing that out-of-basin sources of air pollution may affect its ability to achieve and maintain environmental standards. The cooperation of the States of California and Nevada and the Federal Government will be required to control sources of air pollution which contribute nitrogen loadings to the Lake Tahoe Region.

2. That the Governing Body hereby recognizes the long-term nature of the planning process established by the compact and further recognizes that attainment and

maintenance of the Environmental Threshold Carrying Capacities is a continuing process requiring establishment of time schedules by which the environmental standards will be attained, and the Governing body intends to amend its regional plan to meet such requirements with realistic time schedules and the best available means.

3. That the Governing Body hereby recognizes the long-term nature of the planning process established by the Compact and further recognizes that some of the Environmental Threshold Carrying Capacities for water quality are currently being, and will likely continue to be, exceeded until some time after the full implementation of the loading reductions prescribed by the thresholds.

4. The Environmental Threshold Carrying Capacities shall be reviewed by staff and the Governing Body at the time of adoption of the regional plan to assure that said plan and the Environmental Threshold Carrying Capacities are consistent, and shall be reviewed at least every five years thereafter by the most appropriate means. After such review, the pertinent environmental threshold standards shall be amended where the scientific evidence and technical information indicate:

(a) two or more threshold standards are mutually exclusive; or

(b) substantial evidence to provide a basis for a threshold standard does not exist; or

(c) a threshold standard cannot be achieved; or

(d) a threshold standard is not sufficient to maintain a significant value of the Region

or additional threshold standards are required to maintain a significant value.

The Agency shall maintain a monitoring program to determine progress towards attainment of threshold standards and to provide the basis for such review and amendment of the threshold standards pursuant to the foregoing criteria.

5. That the Governing Body hereby recognizes the long-term nature of establishing, planning for and actually achieving Environmental Threshold Carrying Capacities and will diligently pursue the attainment of those environmental standards through the regional plan and its schedule for implementation. The Governing Body further recognizes that the environmental standards adopted hereby may be considered as part of the environmental review process on projects reviewed pursuant to Article VI(b) of the Compact during the period of time prior to adoption of the regional plan envisioned by Article V(c) of the Compact and adoption of the ordinances required by Article V(g), and that no provision of this resolution or the environmental standards adopted hereby shall affect the maximum number of building permits authorized under the provisions of Article VI(c) of the Compact.

6. That the Governing Body hereby adopts the following as a statement of intent, which will guide the development of the regional plan and actions subsequent to the adoption of that plan:

(a) The Governing Board hereby finds and declares that in adopting these Environmental Threshold Carrying Capacities it does not

intend, and it shall not be construed as authorizing the Agency, to exercise its power to grant or deny a permit in a manner which shall take or damage private property for public use without payment of just compensation.

(b) Nothing in the adoption of these Environmental Threshold Carrying Capacities is intended to increase or decrease the rights of any property owner under the Constitution of California, Nevada or the United States.

(c) It is the intent of the Governing Body that the Environmental Threshold Carrying Capacities will provide the basis for the adoption and enforcement of a regional plan and implementing ordinances which will achieve and maintain such capacities while at the same time providing opportunities for orderly growth and development consistent which such capacities. It is further the intent of the Governing body that the regional plan will provide for carrying out all of the policies expressed in Article I of the Compact.

7. That the Governing Body directs that the regional plan be so structured as to require a fair share of the financial resources required to implement the plan be borne by each of the entities or groups with interests in the region, including the State of California, the State of Nevada, the United States Government, entities of local government with jurisdiction within the Lake Tahoe Region, and the private sector; and

8. That the Environmental Threshold Carrying Capacities set forth in Exhibit "A", attached hereto and incorporated herein by this reference, be, and the same

hereby are, adopted pursuant to Article V(b) of the Compact.

PASSED AND ADOPTED by the Governing Body of the Tahoe Regional Planning Agency this twenty-sixth day of August, 1982, by the following vote:

Ayes: Mr. Heikka, Mr. Hsieh, Mr. Meder, Mr. Stewart, Mr. Kjer, Mr. Steele, Mr. Swachhamer, Mr. Sevinson, Mr. Weise, Mr. Reed, Mr. Jacobsen, Mr. Hall, Mr. Woods, Mr. Ferrari

Nays: None

Abstain: None

Absent: None

/s/ Bennie D. Ferrari
Bennie D. Ferrari, Chairman

EXHIBIT A
TO RESOLUTION NO. 82-11

RESOLUTION OF THE GOVERNING BODY OF THE TAHOE REGIONAL PLANNING AGENCY ADOPTING ENVIRONMENTAL THRESHOLD CARRYING CAPACITIES FOR THE LAKE TAHOE REGION

WATER QUALITY

Pelagic Lake Tahoe

NUMERICAL STANDARD
Reduce dissolved inorganic nitrogen (N) loading from all sources by 25 percent of the 1973-81 annual average. Achieve the following long term water quality standards:

- Annual mean phytoplankton primary productivity: 52 gmC/m^2/yr.
- Winter (December – March) mean Secchi disk transparency: 33.4m.

POLICY

This threshold is currently being exceeded and will likely continue to be exceeded until some time after full implementation of the loading reductions prescribed by the thresholds.

MANAGEMENT STANDARD

Reduce the loading of dissolved phosphorus, iron, and other algal nutrients from all sources as required to achieve ambient standards for primary productivity and transparency.

Reduce dissolved inorganic nitrogen loads from surface runoff by approximately 50 percent, from groundwater approximately 30 percent, and from atmospheric sources approximately 20 percent of the 1973-81 annual average. This threshold relies on predicted reductions in pollutant loadings from out-of-basin sources as part of the total pollutant loading reduction necessary to attain environmental standards, even though the agency has no direct control over out-of-basin sources. The cooperation of the States of California and Nevada will be required to control sources of air pollution which contribute nitrogen loadings to the Lake Tahoe Region.

Littoral Lake Tahoe

NUMERICAL STANDARD

Reduce dissolved inorganic nitrogen loading to Lake Tahoe from all sources by 25 percent of the 1973-81 annual average.

MANAGEMENT STANDARD

Reduce dissolved inorganic nitrogen loads from surface runoff by approximately 50 percent, from groundwater approximately 30 percent, and from atmospheric sources approximately 20 percent of the 1973-81 annual average. This threshold relies on predicted reductions in pollutant loadings from out-of-basin sources as part of the total pollutant loading reduction necessary to attain environmental standards, even though the agency has no direct control over out-of-basin sources. The cooperation of the States of California and Nevada will be required to control sources of air pollution which contribute nitrogen loadings to the Lake Tahoe Region.

NUMERICAL STANDARD

Decrease sediment load as required to attain turbidity values not to exceed 3 JTU. In addition, turbidity shall not exceed 1 JTU in shallow waters of the Lake not directly influenced by stream discharges.

Reduce the loading of dissolved inorganic nitrogen, dissolved phosphorus, iron, and other algal nutrients from all sources to meet the 1967-71 mean values for phyto-plankton primary productivity and periphyton biomass in the littoral zone.

Tributaries

NUMERICAL STANDARD

Attain applicable state standards for concentrations of dissolved inorganic nitrogen, dissolved phosphoorus, and dissolved iron. Attain a 90 percentile value for suspended sediment concentration of 60mg/1.

MANAGEMENT STANDARD

Reduce total annual nutrient and suspended sediment load to achieve loading thresholds for littoral and pelagic Lake Tahoe.

Surface Runoff

NUMERICAL STANDARD

Achieve a 90 percentile concentration value for dissolved inorganic nitrogen of 0.5 mg/1, for dissolved phosphorus of 0.1 mg/1, and for dissolved iron of 0.5 mg/1 in surface runoff directly discharged to a surface water body in the Basin.

Achieve a 90 percentile concentration value for suspended sediment of 250 mg/1.

MANAGEMENT STANDARD

Reduce total annual nutrient and suspended sediment loads as necessary to achieve loading thresholds for tributaries and littoral and pelagic Lake Tahoe.

Groundwater

MANAGEMENT STANDARD

Surface runoff infiltration into the groundwater shall comply with the Uniform Regional Runoff Quality Guidelines as set forth in Table 4-12 of the Draft Environmental Threshold Carrying Capacity Study Report, May, 1982.

Where there is a direct and immediate hydraulic connection between ground and surface waters, discharges to groundwater shall meet the guidelines for surface discharges, and the Uniform Regional Runoff Quality Guidelines shall be amended accordingly.

Other Lakes

NUMERICAL STANDARD

Attain existing water quality standards.

SOIL CONSERVATION

Impervious Cover

MANAGEMENT STANDARD

Impervious cover shall comply with the *Land-Capability Classification of the Lake Tahoe Basin, California-Nevada, A Guide For Planning, Bailey, 1974.*

Stream Environment Zones

NUMERICAL STANDARD

Preserve existing naturally functioning SEZ lands in their natural hydrologic condition, restore all disturbed SEZ lands in undeveloped, unsubdivided lands, and restore 25 percent of the SEZ lands that have been identified as disturbed, developed or subdivided, to attain a 5 percent total increase in the area of naturally functioning SEZ lands.

AIR QUALITY

Carbon Monoxide

NUMERICAL STANDARD

Maintain carbon monoxide concentrations at or below 9 parts per million averaged over 8 hours provided that each state shall review and certify to TRPA by February 28, 1983, as to what their carbon monoxide standards are as of that date, and this TRPA threshold standard shall be changed effective February 28, 1983, if necessary, to be the applicable

state carbon monoxide standard applicable to the respective portions of the region in accordance with Article V(d) of the Compact.

MANAGEMENT STANDARD

Reduce traffic volumes on the U.S. 50 Corridor by 7 percent during the winter from the 1981 base year between 4:00 p.m. and 12:00 midnight, provided that those traffic volumes shall be amended as necessary to meet the respective state standards.

Ozone

NUMERICAL STANDARD

Maintain ozone concentrations at or below 0.08 parts per million averaged over 1 hour.

Maintain oxides of nitrogen (NO_x) emissions at or below the 1981 level.

Regional Visibility

NUMERICAL STANDARD

Achieve 171 kilometers (103 miles) at least 50% of the year as measured by particulate concentrations.

Achieve 97 kilometers (58 miles) at least 90% of the year as measured by particulate concentrations.

Reduce wood smoke emissions by 15% of the 1981 base values through technology, management practices and educational programs.

Subregional Visibility

NUMERICAL STANDARD

Achieve 87 kilometers (54 miles) at least 50% of the year as measured by particulate matter.

Achieve 26 kilometers (16 miles) 90% of the year as measured by particulate matter.

Reduce suspended soil particles by 30% of the 1981 base values through technology, management practices and educational programs. Reduce wood smoke emissions by 15% of the 1981 base values through technology, management practices and educational programs. Reduce vehicle miles of travel by 10% of the 1981 base values.

Nitrate Deposition

MANAGEMENT STANDARD

Reduce the transport of nitrates into the Basin and reduce oxides of nitrogen (NO_x) produced in the Basin consistent with the water quality thresholds.

Reduce vehicle miles of travel in the Basin by 10% of the 1981 base year values.

Odor

POLICY STATEMENT

It is the policy of the TRPA Governing Board in the development of the Regional Plan to reduce fumes from diesel engines to the extent possible.

VEGETATION PRESERVATION

Common Vegetation

MANAGEMENT STANDARD

Increase plant and structural diversity of forest communities through appropriate management practices as measured by diversity indices of species richness, relative abundance, and pattern.

- Maintain the existing species richness of the Basin by providing for the perpetuation of the following plant associations:

  Yellow Pine Forest: Jeffrey pine, White fir, Incense cedar, Sugar pine.

Red Fir Forest: Red Fir, Jeffrey pine, Lodgepole pine, Western white pine, Mountain hemlock, Western juniper.

Subalpine Forest: Whitebark pine, Mountain hemlock, Mountain mahogany.

Shrub Association: Greenleaf and Pinemat manzanita, Tobacco bruch, Sierra chinquapin, Huckleberry oak, Mountain whitethorn.

Sagebrush Scrub Vegetation: Basin sagebrush, Bitterbrush, Douglas chaenactis.

Deciduous Riparian: Quaking aspen, Mountain alder, Black cottonwood, Willow.

Meadow Associations (Wet and Dry Meadow): Mountain squirrel tail, Alphine gentian, Whorled penstemon, Asters, Fescues, Mountain brome, Corn lilies, Mountain bentgrass, Hairgrass, Marsh marigold, elephant heads, Tinker's penney, Mountain Timothy, Sedges, Rushes, Buttercups.

Wetland Associations (Marsh Vegetation): Pond lilies, Buckbean, Mare's tail, Pondweed, Common bladderwort, Bottle sedge, Common spikerush.

Cushion Plant Association (Alpine Scrub): Alpine phlox, Dwarf ragwort, *Draba*.

- Relative Abundants – of the total amount of undisturbed vegetation in the Tahoe Basin;

  1. Maintain at least 4% meadow and wetland vegetation.

  2. Maintain at least 4% deciduous riparian vegetation.

  3. Maintain no more than 25% dominant shrub association vegetation.

  4. Maintain 15-25% of the Yellow Pine Forest in seral stages other than mature.

  5. Maintain 15-25% of the Red Fir Forest in seral stages other than mature.

- Pattern – Provide for the proper juxtaposition of vegetation communities and age classes by;

  1. Limiting acreage size of new forest openings to no more than 8 acres.

  2. Adjacent openings shall not be of the same relative age class or successional stage to avoid uniformity in stand composition and age.

A nondegradation standard to preserve plant communities shall apply to native deciduous trees, wetlands, and meadows while providing for opportunities to increase the acreage of such riparian associations to be consistent with the SEZ threshold.

Native vegetation shall be maintained at a maximum level to be consistent with the limits defined in the *Land Capability Classification of the Lake Tahoe Basin, California-Nevada, A Guide For Planning, Bailey, 1974,* for allowable impervious cover and permanent site disturbance.

POLICY STATEMENT

It shall be a policy of the TRPA Governing Board that a nondegradation standard shall permit appropriate management practices.

Uncommon Plant Communities

NUMERICAL STANDARD

Provide for the nondegradation of the natural qualities of any plant community that is uncommon to the Basin or of exceptional scientific, ecological, or scenic value. This threshold shall apply but not be limited to (1) the deepwater plants of Lake Tahoe, (2) Grass Lake (sphagnum bog), (3) Osgood swamp, and (4) the Freel Peak Cushion Plant community.

Sensitive Plants

NUMERICAL STANDARD

Maintain a minimum number of population sites for each of five sensitive plant species.

Species	Number of Population sites
Carex paucifructus	1
Lewisia pygmaea longipetala	2
Draba asterophora v. *macrocarpa*	2
Draba asterophora v. *asterophora*	5
Rorippa subumbellata	26

WILDLIFE

Special Interest Species

NUMERICAL STANDARD

Provide a minimum number of population sites and disturbance zone for the following six species:

* * *

NOISE

Single Noise Events

NUMERICAL STANDARD

The following maximum noise levels are allowed: (All values are described in decibels)

	Threshold – dSA			
Source	Overall	Less Than 35 MPH	Greater Than 35 MPH	Monitoring Distances
Aircraft	80[1]	–	–	6,500 m – start of takeoff roll 2,000 m – runway threshold approach
	77.1[2]	–	–	6,500 m – start of takeoff roll 2,000 m – runway threshold approach
Boats	82	–	–	50 ft. – engine at 3,000 rpm
Motor vehicles less than 6,000 GVW	–	76	82	50 ft.
greater than 6,000 GVW	–	82	86	50 ft.
Motorcycles	–	77	86	50 ft.
Off road vehicles	–	72	86	50 ft.
Snowmobiles	–	82	–	50 ft.

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[1] Not to be effective until five years after adoption of Environmental Threshold Carrying Capacities, provided that incremental and phased improvements toward that standard shall be provided by the Regional Plan.

[2] Between the hours of 8:00 p.m. and 8:00 a.m.

Cumulative Noise Events

NUMERICAL STANDARD

Background noise levels shall not exceed existing levels, or the following levels, whichever is less:

Land use category	Average noise level or CNEL range (dBA)
High density residential areas	55
Low density residential areas	50
Hotel/motel facilities	55
Commercial areas	65
Urban outdoor recreation areas	55
Rural outdoor recreation areas	50
Wilderness and roadless areas	25
Critical wildlife habitat areas	25

POLICY STATEMENT

It shall be a policy of the TRPA Governing Body in the development of the Regional Plan to define, locate, and establish CNEL levels for transportation corridors.

RECREATION

POLICY STATEMENT

It shall be the policy of the TRPA Governing Body in development of the Regional Plan to preserve and enhance the high quality recreational experience, including preservation of high quality undeveloped shorezone and other natural areas. In developing the Regional Plan, the staff and Governing Body shall consider provisions for additional access, where lawful and feasible, to the shorezone and high quality undeveloped areas for low density recreational uses.

It shall be the policy of the TRPA Governing Body in development of the Regional Plan to establish and insure a fair share of the total Basin capacity for outdoor recreation is available to the general public.

SCENIC RESOURCES

Roadway and Shoreline Units

NUMERICAL STANDARD

Maintain or improve the numerical rating assigned each unit, including the scenic quality rating of the individual resources within each unit, as recorded in the Scenic Resources Inventory and shown in Tables 13-3, 13-5, 13-8 and 13-9 of the Draft Study Report.

Maintain the 1982 ratings for all roadway and shoreline units as shown in Tables 13-6 and 13-7 of the Draft Study Report.

Restore scenic quality in roadway units rated 15 or below and shoreline units rated 7 or below.

Other Areas

MANAGEMENT STANDARD

Maintain or improve the visual quality of views from bike paths and outdoor recreation areas open to the general public. Upon completion of the 1982 Visual Quality Index, this standard shall become a numerical standard.

Built Environment

POLICY STATEMENT

It shall be the policy of the TRPA Governing Body in development of the Regional Plan, in cooperation with local jurisdictions, to insure the height, bulk, texture, form, materials, colors, lighting, signing and other design elements of new, remodeled and

redeveloped buildings be compatible with the natural, scenic, and recreational values of the region.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
DEFENDANTS' EXHIBIT 227

TAHOE REGIONAL PLANNING AGENCY

ORDINANCE NO. 81-5

AN ORDINANCE AMENDING ORDINANCE NO. 79-10 OF THE TAHOE REGIONAL PLANNING AGENCY IMPLEMENTING THE LAKE TAHOE REGION WATER QUALITY MANAGEMENT PLAN; IMPLEMENTING AMENDMENTS TO SAID WATER QUALITY MANAGEMENT PLAN; REGULATING AND PROHIBITING DEVELOPMENT OF HIGH HAZARD LANDS, PENDING ADOPTION OF A REVISED REGIONAL PLAN UNDER THE TAHOE REGIONAL PLANNING COMPACT, AS AMENDED; PROHIBITING DEVELOPMENT OF STREAM ENVIRONMENT ZONE LANDS AND EXCESS LAND COVERAGE IN DISTRICTS 4 THROUGH 7, PENDING ADOPTION OF SAID REVISED PLAN; PRESCRIBING MITIGATION MEASURES AND FEES; PROHIBITING NEW SUBDIVISIONS, PENDING ADOPTION OF SAID REVISED PLAN; PRESCRIBING A REGULATORY PROGRAM FOR ON-SITE RUNOFF, A PLAN FOR CONSTRUCTION OF REMEDIAL MEASURES AND IMPLEMENTATION OF BEST MANAGEMENT PRACTICES ON FOREST LANDS; ENFORCING PROVISIONS OF THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD 208 PLAN; PRESCRIBING PENALTIES; AND PROVIDING FOR OTHER MATTERS PROPERLY RELATING THERETO.

The Governing Body of the Tahoe Regional Planning Agency does ordain as follows:

Section 1.00 Findings

1.10 Section 208 of the Federal Clean Water Act requires the preparation of regional water quality control plans ("208 plans"). The federal regulations require there be no further degradation of the water quality in Lake Tahoe. In 1974 the States of Nevada and California jointly designated the Tahoe Regional Planning Agency as the agency responsible for preparation of a 208 plan for the Lake Tahoe Region, which plan must be certified by said states prior to submission to the United States Environmental Protection Agency for final approval. In 1978 the Tahoe Regional Planning Agency approved the "Lake Tahoe Basin Water Quality Management Plan", which plan, while assessing water quality problems in the Lake Tahoe Region, eliminated several major control measures proposed in the draft of said plan and lacked commitment for enforcement of the controls incorporated therein.

1.20 The State of Nevada conditionally certified the 208 plan approved by the Tahoe Regional Planning Agency, but the California State Water Resources Control Board rejected it for failure to include the control actions and enforcement commitments considered by said board to be necessary to protect Lake Tahoe. Said board further revoked the Tahoe Regional Planning Agency's designation as the 208 planning agency for the California portion of the Lake Tahoe Region, and in October 1980 prepared its own 208 plan for said portion. Said board however, recognized the desirability of a bi-state 208

plan, recommending that the Tahoe Regional Planning Agency adopt certain changes in its 208 plan, and indicating that adoption thereof would result in certification by the State of California of said agency's plan.

1.30 On December 19, 1980 the Tahoe Regional Planning Compact was amended, requiring, among other things, that the Tahoe Regional Planning Agency adopt environmental threshold carrying capacities and, based thereon, a revised regional plan on or before June 19, 1983. The amendments to said compact also provide limitations upon development in the Lake Tahoe Region that might otherwise absorb the capability of the region for further development or direct development out of harmony with the revised regional plan. While the Section 208 planning process commenced prior to and is separate and independent from the amendments to said compact, said process, including the provisions of this ordinance, is in accordance with the letter and spirit of said amendments, particularly with respect to the need, pending adoption of a revised regional plan, to restrict or prohibit development upon environmentally sensitive lands as provided herein.

1.40 As required by law, the Governing Body of the Tahoe Regional Planning Agency, prior to the adoption of this ordinance and the amendments to said agency's Lake Tahoe Basin Water Quality Management Plan implemented hereby, conducted duly noticed public hearings, at which hearings considerable oral testimony and documentary evidence were received and considered by the Governing Body. Evidence in the record of said hearings, which evidence is hereby

determined substantial, showed that serious degradation of the quality of the water of Lake Tahoe is occurring, which degradation, absent at least the land use controls set forth in this ordinance, may irreversibly damage Lake Tahoe and the Lake Tahoe Region.

1.50 This ordinance is necessary and desirable to promote, and is reasonably related to, the public health, safety and general welfare of the Lake Tahoe Region, complies in all respects, procedural and substantive, with the Tahoe Regional Planning Compact and the regional plan, including the water quality management plan as amended to date, ordinances, rules, regulations and policies of the Tahoe Regional Planning Agency, and is necessary to effectuate and implement the same. This ordinance and the amendments to said agency's Lake Tahoe Basin Water Quality Management Plan implemented hereby are in furtherance of a bi-state approach to Section 208 planning in the Lake Tahoe Region, as opposed to such planning upon an otherwise undesirable single-state basis, and are in compliance with the Federal Clean Water Act.

1.60 The amendments to the water quality management plan and the provisions of this ordinance implementing same were the subject of an environmental impact statement, which statement was prepared, circulated, certified and otherwise processed, reviewed and approved by the Tahoe Regional Planning Agency in accordance with the substantive and procedural provisions of Article VII of the Tahoe Regional Planning Compact.

1.70 The case-by-case review process adopted by this ordinance is costly, time-consuming and difficult to enforce. The process is necessary on an interim basis, however, to prevent hardship to owners of property within the Region.

Section 2.00 Amendment Regulating Development on High-Erosion and High-Runoff Hazard Lands.

Section 12.00 of Ordinance No. 79-10 of the Tahoe Regional Planning Agency is hereby amended to read as follows:

Section 12.00 Regulation of Development on High-Erosion and High-Runoff Hazard Lands.

12.10 Classification of Areas for Review of Residential Development.

The regulation or prohibition under this ordinance of residential development upon lots or parcels lawfully of record as of December 19, 1980 and within land capability districts 1a, 1c. 2 and 3 shall be pursuant to classification of the development characteristics of the subdivision or area in which the lot or parcel is situated. The Governing Body or executive officer of the Agency shall appoint a planning team consisting of a team leader, ecologist, hydrologist, soil scientist, engineer and architect, which team shall evaluate the development characteristics of the pertinent subdivision or area for classification for purposes of this ordinance as "adequate" "potentially adequate" or "in need of further consideration". In the case of a subdivision, such

evaluation shall be pursuant to consultation with a representative of the subdivision.

12.11 Standards for Classification.

Classification by the planning team of subdivisions and areas for purposes of this ordinance shall be pursuant to the following standards:

(a) "Adequate" – proper placement of roads and drainage structures in relationship to natural features; proper maintenance of all facilities, including, without limitation, those relating to drainage and erosion control; stable cuts and fills; few downstream impacts or adverse environmental effects as a result of land coverage within the subdivision or area; stable internal and downstream drainages and waterways; absence of difficulties in access to the subdivision or area as a result of placement of building sites in relationship to roadways; and land coverage is generally below that permitted by the Agency's Land Use Ordinance.

(b) "Potentially adequate" – proper placement of roads in relationship to natural features; proper placement generally of drainage structures, with the need of some additional drainage structures; proper stabilization generally of cuts and fills, with the need of some additional stabilization thereof; construction of improvements in the subdivision or

area may have caused minor downstream impacts or adverse environmental effects upon drainages and waterways; and land coverage is generally below that permitted by the Agency's Land Use Ordinance.

(c) "In need of further consideration" – poor placement of roads and drainage structures in relationship to natural features; unstable cuts and fills, which are incapable of satisfactory rehabilitation; unstable internal and downstream drainages and waterways; land coverage generally exceeds that permitted by the Agency's Land Use Ordinance; and the lack in individual cases of substantial construction of roads, utilities or drainage structures.

12.12 Application of Standards

(a) The nature and characteristics of the subject regulated by this ordinance dictate that the standards set forth in subsection 12.11 be general. The duty of the planning team in applying said standards to a particular subdivision or area shall be to determine the adequacy, potential adequacy or clear inadequacy of the subdivision or area, including all improvements therein, to minimize the adverse effects of further development therein upon the quality of water in the region.

(b) In determining and classifying the "area" for purposes of residential

development upon a parcel, the planning team pursuant to subsection 12.11 shall evaluate that area of land situated in the vicinity and in the watershed of the parcel, to which area the parcel reasonably relates for purposes of determining the effect on the quality of water in the region of development on the parcel.

(c) The entire subdivision or area, as the case may be, shall be evaluated and classified by the planning team pursuant to subsection 12.11, notwithstanding that a portion thereof is within land capability districts other than 1a, 1c, 2 and 3.

12.13 Appeal of Classification.

Any aggrieved person may appeal the classification by the planning team of a subdivision or area by lodging a written notice of appeal with the Agency. Such appeal shall be heard by the Governing Body, which may affirm, reverse or modify the determination by the planning team. The decision by the Governing Body on any such appeal shall be final.

2.20 Review of Permitted Development.

12.21 Permit Required.

Except as otherwise provided by this ordinance, no person shall perform any construction, work use or activity, including without limitation, grading, clearing, removal of vegetation, filling or creation of land coverage, upon land within land capability districts 1a, 1c, 2 and 3 without first

obtaining a permit from the Agency. The application for such permit shall be reviewed and approved as a "project" pursuant to the Compact and the Rules and Regulations of Practice and Procedure of the Agency. Such application shall not be accepted or reviewed, and no permit pursuant thereto issued, by the Agency unless the application, in complete form, is received by the Agency on or before May 31, 1982 and the construction, work, use or activity proposed is for a single-family house to be constructed on a lot within a subdivision classified pursuant to subsection 12.10 as adequate or potentially adequate, or on a parcel within an area so classified.

12.22 Consideration of Permit Application.

The application for a permit pursuant to subsection 12.21 shall be reviewed with respect to all potential effects upon water quality of the construction of a single-family house on the pertinent lot or parcel. Such review shall include, but need not be limited to, the factors of vegetative cover, proximity of the project to a stream or wet land, runoff potential and land stability, as set forth in the document entitled "1981 TRPA Case by Case Lot Review Criteria", as the same may be amended from time-to-time by resolution of the Governing Body. In addition to findings otherwise required by Article VI(b) of the Compact, such application shall not be approved unless it is found by the Agency that the construction work, use or activity proposed thereby will

not adversely affect the quality of water within the region, and that it is in accordance with the Handbook of Best Management Practices, the Plan and all other applicable plans, ordinances, rules, regulations and policies of the Agency. The applicant shall prove that the project will mitigate, below levels of significance, the cumulative adverse effect upon water quality of development of land within land capability districts 1 through 3 for purposes of issuance of a permit under section 12.00 and the making of a finding of no adverse effect on quality of water in the region under this subsection. The following additional findings shall be made with respect to any project proposing land coverage in excess of that permitted by the pertinent land capability district:

(a) The project may individually and cumulatively contribute to continued erosion and nutrient increase causing degradation of Lake Tahoe; and

(b) Mitigation measures have been incorporated into the project, including application of construction or contribution toward construction of offsite remedial erosion control measures which will offset any anticipated adverse effects. These measures constitute changes or alterations required in or incorporated into such project which avoid or

reduce the significant adverse environmental effects to a less than significant level pursuant to Article VII of the Compact.

12.23 Permitted Land Coverage.

No permit issued pursuant to subsection 12.21 shall authorize, and no person shall create, or perform any construction, work, use or activity for the purpose of creation of, land coverage in excess of that permitted pursuant to section 9.24 of the Agency's Land Use Ordinance (Ordinance No. 4) or twenty percent (20%) of the area of the pertinent lot or parcel, whichever is less. For this purpose, "lot" within the meaning of said section 9.24 shall include "parcel" as used in this ordinance, and land coverage shall be calculated in accordance with sections 8.22, 8.23 and 8.24 of said Land Use Ordinance.

12.30 Residential Remodeling, Additions and Reconstruction.

12.31 Application Procedure.

Applications for remodeling and reconstruction of, and additions to, single-family houses existing on May 27, 1981 on land within land capability districts 1a, 1c, 2 and 3, which involve grading, clearing, removal of vegetation or filling and result in remaining land coverage in excess of that permitted by the pertinent land capability district, shall be processed pursuant to section 9.21 of the Agency's Land Use Ordinance, to the extent such section is applicable. If section 9.21 is not applicable, or cannot be feasibly

applied to the application, and the nonconforming land coverage pertaining to such application cannot be eliminated by the consolidation of the subject lot or parcel with another lot or parcel, such application shall be processed, reviewed and approved pursuant to subsections 12.10 and 12.20.

12.32 Mitigation.

Approval by the Agency of a permit for remodeling or reconstruction of, or an addition to, a single-family house shall be conditioned upon mitigation to offset any increased erosion as a result of the creation of new land coverage, which mitigation shall be based upon the squarefootage of new land coverage in accordance with subsection 12.50.

12.33 Best Management Practices.

Approval by the Agency of a permit for the remodeling or reconstruction of, or an addition to, a single family house shall be conditioned upon application of best management practices to the entire lot or parcel upon which such house is situated.

12.40 Prohibition of Commercial Land Coverage In Excess of Land Capability System.

12.41 Prohibition.

Except as otherwise provided in this subsection, the Agency shall accept and review applications, and issue permits, for new commercial construction, uses and activities within the region pursuant to the Compact and otherwise applicable ordinances by the Agency. No such application shall be

accepted or reviewed, and no permit thereunder issued, by the Agency unless the construction, use or activity proposes land coverage in accordance with that permitted by the pertinent land capability district. For purposes of this subsection, the term "new commercial construction, uses and activities" includes commercial remodeling, additions and reconstruction involving creation of new land coverage.

12.42 Exceptions to Prohibition.

Land coverage in excess of that permitted by the pertinent land capability district, and otherwise authorized by the Agency's Land Use Ordinance, may be approved by the Agency for commercial construction, uses or activities occurring within land capability districts 4, 5, 6 and 7, provided such approval is pursuant to:

(a) Replacement of nonconforming land coverage pursuant to section 9.21 of said Land Use Ordinance;

(b) The consolidation of the lot or parcel upon which the construction, use or activity is to occur with another lot or parcel, upon which there is to be created no additional land coverage, such consolidation resulting in land coverage in accordance with the pertinent land capability district; or

(c) The transfer, by an appropriate recorded document prescribed by the Agency, of permitted land coverage from a lot or parcel within the same watershed as the lot or parcel upon

which the construction, use or activity is to occur, such transfer resulting in land coverage in accordance with the land capability district or districts applicable to the transferor and transferee lots or parcels as a whole.

12.43 Application of Provisions.

"Commercial" for purposes of this section refers to construction, uses or activities lawfully permitted within the General Commercial and Tourist Commercial Districts as set forth in the Regional Plan as well as any other commercial use permitted within any other district set forth therein. Calculation of land coverage pursuant to this section shall be in accordance with sections 8.22, 8.23 and 8.24 of the Agency's Land Use Ordinance.

12.50 Mitigation Measures.

12.51 Required Measures.

The approval of issuance by the Agency of any permit or other authorization for any construction, use or activity, whether pursuant to this ordinance or any other ordinance of the Agency, shall be expressly conditioned upon the construction implementation or use, as the case may be, of remedial erosion control measures determined by the Agency as adequate to offset or compensate for any increased erosion caused by such construction, use or activity. Such measures shall be in addition to any best management practices otherwise required as a condition upon such approval or issuance.

12.52 Mitigation Fee.

The applicant shall pay to the Agency a mitigation fee based upon an assessment of an average of one hundred fifty percent (150%) of the amount of mitigation necessary to offset or compensate for any such increased erosion. In lieu of this fee, the applicant may provide services of an equivalent value. Such fee shall be set pursuant to resolution of the Governing Body, as amended from time-to-time, which resolution shall relate the amount of the fee to the nature and extent of the mitigation required. The Agency shall deposit proceeds of the mitigation fee into trust funds, to be individually known as the Water Quality Mitigation Fund, which funds shall be administered and distributed by the city or counties, with approval of the Agency, for expenditure upon the most cost-effective remedial control measures within the jurisdiction of origin set forth in the Plan. The mitigation fee established by the Agency shall be based upon the following factors:

(a) The estimated increased erosion taking place during and after development of the site, assuming application of best management practices, which estimate shall relate to the number of square feet of land coverage to be created and the pertinent land capability district;

(b) The incremental cost of correction of existing erosion, based on reduction of an average of one hundred fifty percent (150%) of the

amount of erosion actually to be reduced; and

(c) The least cost-effective remedial control strategies set forth in the Plan.

12.60 Prohibition of Other Uses.

Except as otherwise provided by this ordinance, and subject to the exceptions set forth in this subsection, no person shall perform any grading, clearing, removal of vegetation, filling or creation of land coverage upon land within land capability districts 1a, 1c, 2 and 3. Said prohibition and the provisions of subsections 12.10, 12.20, 12.30 and 12.40 do not apply to:

12.61 Approved Subdivisions.

Land within subdivisions approved by the Agency after February 10, 1972 in accordance with the Agency's land capability district regulations, without reliance upon or reference to sections 7.83, 8.25(2), 8.28, 8.34 or 9.23 of the Agency's Land Use Ordinance, as amended or renumbered from time-to-time, and it is determined in writing by the Agency that erosion controls, drainage devices and other facilities for the protection of water quality, required by the Agency at the time of approval, have been properly installed and maintained.

12.62 Public Works.

Construction of a public work by a public entity, provided the Agency finds that such work is necessary for implementation of the Nonattainment Air Quality Plan or the transportation element of the Regional Plan,

or is necessary for public recreation or the protection of the public health, safety or general welfare, and all other feasible alternatives not involving construction within said district have been exhausted.

12.63 Man-Modified Areas.

Land within such districts, which the Agency finds has been so substantially modified as to alter the land capability, soil characteristics, hydrology, geomorphic characteristics and vegetation prior to February 10, 1972, as determined pursuant to Section 8.29 of the Land Use Ordinance.

12.64 Approved Erosion Control Work.

Erosion control work approved by the Agency.

12.65 Outdoor Recreation Facilities.

Construction of outdoor recreation facilities open to the public.

12.70 Administrative Challenge to Land Capability District Classification.

Any interested person may challenge the land capability district classification of land pursuant to section 8.25(1) of the Agency's Land Use Ordinance, whereupon an appropriate classification may be determined as provided in such section.

Section 3.00 Amendment Prohibiting Development In Stream Environment Zone.

Section 13.00 of Ordinance No. 79-10 of the Tahoe Regional Planning Agency is hereby amended to read as follows:

13.10 Prohibition.

Notwithstanding any other provision of this ordinance or of any other ordinance of the Agency, no person shall perform any grading, clearing, removal of vegetation, filling or creation of land coverage, within or upon a stream environment zone ("SEZ"), as described or depicted upon maps contained in the Plan.

13.20 Development on Lots or Parcels Containing Stream Environment Zones.

Notwithstanding any other provision of this ordinance or of any other ordinance of the Agency, no person shall perform any construction, work, use or activity upon a lot or parcel containing an SEZ without first obtaining a permit from the Agency, the application for which permit shall be reviewed and approved as a "project" pursuant to the Compact and the Rules and Regulations of Practice and Procedure of the Agency. Such application shall not be approved unless it is found by the Agency that it proposes no grading, clearing, removal of vegetation, filling or creation of land coverage within the SEZ, and that it is in accordance with the Handbook of Best Management Practices, the Plan and all other applicable plans, ordinances, rules, regulations and policies of the Agency.

13.30 Exception For Certain Public Projects and Man-Modified Areas.

The prohibition upon construction, work, use or activity within or upon an SEZ does not apply to:

13.31 Public Works.

Construction of a public work by a public entity, provided the Agency finds that such work is necessary for implementation of the Nonattainment Air Quality Plan or the transportation element of the Regional Plan, or is necessary for public recreation or the protection of the public health, safety or general welfare, and all other feasible alternatives not involving construction within the SEZ have been exhausted.

13.32 Man-Modified Areas.

SEZ lands, which the Agency finds have been so substantially modified as to alter the land capability, soil characteristics, hydrology, geomorphic characteristics and vegetation prior to February 10, 1972, as determined pursuant to section 8.29 of the Land Use Ordinance.

13.33 Approved Erosion Control Work.

Erosion control work approved by the Agency.

13.40 Administrative Challenge to Stream Environment Zone Boundary.

Any interested person may challenge the accuracy of the boundary of an SEZ pursuant to subsection 10.30, whereupon an appropriate boundary may be fixed as provided in such section.

Section 4.00 Amendment Prohibiting Land Coverage In Excess of Land Capability System for Districts 4 through 7.

Ordinance No. 79-10 of the Tahoe Regional Planning Agency is hereby amended by adding new Section 14.00, to read as follows:

Section 14.00 Prohibition of Land Coverage In Excess of Land Capability System for Districts 4 through 7.

14.10 Prohibition.

Notwithstanding any other provision of this ordinance or of any other ordinance of the Agency, including without limitation, the provisions of the Agency's Land Use Ordinance authorizing land coverage in excess of that permitted by the pertinent land capability district, no person shall create, or perform any construction, work, use or activity for the purpose of creation of, land coverage in excess of that permitted by land capability districts 4, 5, 6 and 7. Land coverage shall be calculated in accordance with sections 8.22, 8.23 and 8.24 of the Agency's Land Use Ordinance, provided that land coverage shall be calculated only with reference to the land owned or controlled by the applicant, thus excluding improvements not

located upon such land, such as public street and other off-site public facilities. The prohibition of this section applies to construction, work, use or other activities not otherwise prohibited by this ordinance or any other ordinance of the Agency.

14.20 Exceptions to Prohibition.

The prohibition of this section does not apply to:

14.21 Replacement.

Replacement of existing nonconforming land coverage pursuant to the Agency's Land Use Ordinance.

14.22 Approved Subdivisions.

The creation of land coverage upon a lot located within a subdivision approved by the Agency after February 10, 1972 in accordance with the Agency's land capability district regulations, without reliance upon or reference to sections 7.83, 8.25(2), 8.28, 8.34 or 9.23 of the Agency's Land Use Ordinance, as amended or renumbered from time-to-time, and it is determined in writing by the Agency that erosion controls, drainage devices and other facilities for the protection of water quality, required by the Agency at the time of approval, have been properly installed and maintained.

14.23 Net Reduction of Coverage.

Creation of land coverage upon a lot or parcel within a subdivision or planned

unit development, the otherwise permitted nonconforming land coverage for which is reduced to that authorized by the land capability district within which the subdivision or development is located, or, if there is more than one such district such coverage is reduced to that complying with the total coverage authorized by such districts.

14.24 Public Works.

Creation of land coverage for a public work by a public entity, provided the Agency finds that such work is necessary for implementation of the Nonattainment Air Quality Plan or the transportation element of the Regional Plan, or is necessary for public recreation or the protection of the public health, safety or general welfare, and all other feasible alternatives not involving creation of land coverage in excess of that permitted by the pertinent land capability district have been exhausted.

14.25 Approved Erosion Control Work.

Erosion control work approved by the Agency.

14.30 Administrative Challenge to Land Capability District Classification.

Any interested person may challenge the land capability district classification of land pursuant to section 8.25(1) of the Agency's Land Use Ordinance,

whereupon an appropriate classification may be determined as provided in such section.

Section 5.00 Amendment Providing Remedial Erosion Control and Drainage Projects.

Ordinance No. 79-10 of the Tahoe Regional Planning Agency is hereby amended by adding new section 15.00, to read as follows:

Section 15.00 Remedial Erosion Control and Drainage Projects.

The Agency shall oversee and, to the extent legally permissible cause to be implemented, a 20-year phased implementation schedule for remedial erosion control and drainage projects contained in the Plan in accordance with the provisions of "Alternative Action 3 – Regulatory Program Tied to Full 20-Year Implementation Program", as set forth in section IIIF.3. in the Plan. The Agency shall adopt a mandatory regulatory program, pursuant to ordinance of the Agency.

Section 6.00 Amendment Prohibiting Subdivisions.

Ordinance No. 79-10 of the Tahoe Regional Planning Agency is hereby amended by adding new section 16.00, to read as follows:

Section 16.00 Prohibition of Subdivisions.

16.10 Prohibition.

No subdivision shall be approved, and no person shall perform any construction, work, use or activity in connection with off-

site improvements for a subdivision, including without limitation, roads and utilities. This section shall not apply to construction of off-site improvements for a subdivision approved by the Agency, which construction is not otherwise limited or prohibited by this ordinance. The meaning of "subdivision" for purposes of this section is the same as the meaning of that term for purposes of Article VI(c)(1) of the Compact.

16.20 Exceptions to Prohibition.

The prohibition of this section does not apply to the subdivision of land owned by a general improvement district which existed and owned the land before December 19, 1980, provided such subdivision is necessary to avoid insolvency of the district, and it is demonstrated by the applicant that water quality objectives will be attained through appropriate mitigation measures or pollution offsets.

Section 7.00 Amendment Providing Best Management Practices On Forest Lands.

Ordinance No. 79-10 of the Tahoe Regional Planning Agency is hereby amended by adding new section 17.00, to read as follows:

Section 17.00 Best Management Practices On Forest Lands.

The Handbook of Best Management Practices shall be implemented for correction of water quality problems on forest lands without issuance by the Agency of a development or use permit. In addition to otherwise applicable

requirements of Handbook of Best Management Practices (Volume II), the following practices shall be used for the following uses or activities:

17.10

Best Management Practice XII A (Volume II) shall be used as a guideline for livestock confinement activities.

17.20

Best Management Practice XII B (Volume II) shall be used as a guideline for ski area use and development.

17.30

Best Management Practice XII C (Volume II) shall be used as a guideline for operation of golf courses, including but not limited to the limitations upon application of fertilizer and prohibition of fast-release fertilizer.

17.40

Best Management Practice XII D (Volume II) shall be used as a guideline for logging operations. Except as otherwise provided in this section, clear-cut logging operations are prohibited timber harvesting activities. Such prohibition of clear-cut logging operations shall not apply to clear-cuts up to five (5) acres in size for purposes of appropriate forest management practices, consisting of management of timber resources, wildlife habitats, insect and disease control and the long-range visual quality of the Region. Selective harvest techniques shall be utilized in logging operations, except for removal of diseased trees or trees infected

by insects, which removal is necessary to maintain the health and diversity of the timber stand.

17.50

Best Management Practice XII E (Volume II) shall be used as a guideline for off-road vehicular use. The Agency shall designate areas closed and restricted to off-road vehicular use in coordination with the U.S. Forest Service.

17.60

Revegetation, resurfacing or other measures to control erosion from dirt roads on forest lands shall be consistent with the recommendations of the Handbook of Best Management Practices.

Section 8.00 Amendment Specifying Relationship to Compact and Other Agency Ordinances.

Ordinance No. 79-10 of the Tahoe Regional Planning Agency is hereby amended by adding new Section 18.00, to read as follows:

Section 18.00 Relationship to Compact and Other Agency Ordinances.

18.10 Compact.

The provisions of this ordinance are subject to the Compact, including without limitation, the provisions of Article VI(c) thereof relating to the allocation of building permits for residential units and commercial square-footage.

18.20 Other Ordinances.

In the event a provision of this ordinance conflicts with a provision of any previously adopted ordinance of the Agency, the provision of this ordinance, to the extent of such conflict, prevails. A residential or commercial construction use or activity, otherwise permitted by this ordinance, shall also comply with the Regional Plan and all other applicable Agency ordinances.

Section 9.00 Amendment Providing Penalties for Violation.

Ordinance No. 79-10 of the Tahoe Regional Planning Agency is hereby amended by adding new Section 19,.00, to read as follows:

Section 19.00 Penalties for Violation.

Any person who violates any provision of this ordinance or of any condition of approval imposed by the Agency is subject to civil penalties in accordance with Article VI(1) of the Compact.

Section 10.00 Amendment Specifying Applicability of Regulations.

Ordinance No. 79-10 of the Tahoe Regional Planning Agency is hereby amended by adding new Section 20.00, to read as follows:

Section 20.00 Applicability of Provisions of Ordinance.

20.10 Nevada.

The provisions of section 12.00 of this ordinance, excluding subsections 12.50, 12.51, and 12.52, inclusive, apply to the portion of the Region located within the State of Nevada. All other provisions of this ordinance, including without limitation said subsections 12.50, 12.51 and 12.52, but excluding subsection 20.20, apply to the entire region.

20.20 California.

With respect to the portion of the Region lying within the State of California, the Agency, subject to the provisions of section 21.00 shall enforce, as its plan, the following provisions of the Lake Tahoe Basin Water Quality Plan, California State Water Resources Control Board, 1981:

20.21 Water Quality Problems and Control Needs, Chapter III (pp. 64-136).

20.22 Implementation, Chapter IV (pp. 137-189).

20.23 Alternative C, Chapter V(A)(3) (pp. 191-192).

20.24 Municipal Wastewater Treatment, Chapter V(C) (pp. 196-213).

20.25 Solid Waste, Chapter V(E)(f) (pp. 238-240).

This provision shall apply so long as the foregoing provisions of said plan of the California State Water Resources Control Board lawfully remain enforceable.

20.30 Exemptions.

Sections 12.00, 13.00 and 14.00 of this ordinance do not apply to the construction of a new single-family house or the reconstruction or remodeling of, or the construction of an addition to, a single-family house lawfully in existence on December 19, 1980, if the following conditions are met:

20.31 The single-family house is within, or is to be built within, the portion of the Region located within the State of California, and the applicant for permits pertaining thereto received either of the following:

(a) An approval or "release" for final construction drawings by the California Tahoe Regional Planning Agency, receipt of which occurred prior to December 19, 1980; or

(b) A 1980 sewer allocation, receipt of which occurred prior to October 29, 1980.

20.32 The single-family house is within, or is to be built within, the portion of the Region located within the State of Nevada, and the applicant for permits pertaining thereto received both of the following:

(a) Sewer and water permits, receipt of which occurred prior to December 19, 1980; and

(b) An allocation for a building permit within the limitations imposed

for calendar year 1980 pursuant to Article VI(c) of the Compact.

Section 11.00 Amendment Providing Expiration of Provisions.

Ordinance No. 79-10 of the Tahoe Regional Planning Agency is hereby amended by adding new Section 21, to read as follows:

Section 21.00 Expiration of Provisions.

The provisions of section 12.00, excluding subsections 12.40, 12.41, 12.42, 12.43, 12.50, 12.51, 12.52, 12.60, 12.61, 12.62, 12.63, 12.64, 12.65 and 12.70 of this ordinance shall expire on November 30, 1982, unless otherwise extended. The provisions of subsections 12.40, 12.41, 12.42, 12.43, 12.60, 12.61, 12.62, 12.63, 12.64, 12.65, 12.70, sections 13.00, 14.00, 16.00 and subsections 20.20, 20.21, 20.22, 20.23, 20.24, and 20.25 of this ordinance shall expire upon the adoption by the Agency of amendments to the Regional Plan pursuant to Article V(c) of the Compact.

Section 12.00 Amendment of Existing Definitions.

Section 3.00 of Ordinance No. 79-10 of the Tahoe Regional Planning Agency is hereby amended by causing the following definitions therein to read in the following manner, with the other definitions set forth in said section 3.00, not modified by this ordinance, to remain as presently set forth in said section:

Plan – The Lake Tahoe Basin Water Quality Management Plan as described in Ordinance No. 79-3, as amended by Ordinance No. 81-4.

Region – All that area described in Article II(a) of the Tahoe Regional Planning Compact, as amended.

Section 13.00 Amendment Adding Definitions.

Section 3.00 of Ordinance No. 79-10 of the Tahoe Regional Planning Agency is hereby amended by adding the following definitions thereto:

Compact – The Tahoe Regional Planning Compact, as amended.

Land Capability District – One of the seven (7) land capability districts as depicted or described in the Regional Plan of the Tahoe Regional Planning Agency and the Land Capability Map, with accompanying text, contained in said Regional Plan.

Section – Unless otherwise specified, a section set forth in this ordinance, including all subsections; e.g. section 12.00 includes all subsections therein such as 12.10, 12.11, 12.20, 12.21 et seq.

The definitions of the following terms contained in section 3.00 of the Land Use Ordinance of the Tahoe Regional Planning Agency are incorporated herein by this reference as though fully set forth: Governing Body; Land Coverage; Lot; Outdoor Recreation; Parcel; Person; Regional Plan; Single-family dwelling unit; and Single-family house.

The definitions of the following terms contained in section 3.00 of the Grading Ordinance of the Tahoe Regional Planning Agency are incorporated herein by this reference as though fully set forth: Clearing of Vegetation; and Fill.

Section 14.00 Amendments to Sections 4.10, 6.10, 10.20 and 10.40.

Sections 4.10, 6.10, 10.20 and 10.40 of Ordinance No. 79-10 of the Tahoe Regional Planning Agency are hereby amended to read as follows, respectively:

4.10 Adoption of Plan.

By Ordinance No. 79-3, as amended by Ordinance No. 81-4, the Agency adopted the Plan as a portion of the land use element of the Regional Plan. This ordinance implements the Plan.

6.10 Findings.

The Governing Body, in accordance with the provisions and purposes of Article V and Article VI of the Compact, and in accordance with the Federal Clean Water Act and non-degradation policy hereby finds it necessary to adopt water quality standards and objectives for the Region, as well as the limitations and prohibitions upon development set forth in this ordinance.

10.20 Development on SEZ.

Except as otherwise prohibited or limited by this ordinance, development on SEZ land shall comply with the appropriate provisions of the Handbook of Best Management Practices.

10.40 Development on Other Land.

Except as otherwise prohibited or limited by this ordinance, development on lands within the Region shall comply with the appropriate provisions of the Handbook of Best Management Practices.

Section 15.00 Interpretation and Severability.

The provisions of this ordinance shall be liberally construed to effect their purposes. If any section, clause, provision or portion of this ordinance is declared unconstitutional or invalid by a court of competent jurisdiction, the remainder of this ordinance shall not be affected thereby. For this purpose, the provisions of this ordinance are hereby declared severable.

Section 16.00 Effective Date.

This ordinance shall be effective sixty (60) days after the date of its adoption.

FIRST READING: May 28, 1981

SECOND READING: June 25, 1981

PASSED AND ADOPTED by the Governing Body of the Tahoe Regional Planning Agency at a regular meeting held June 25, 1981, by the following vote:

Ayes: Mr. Stewart, Mr. Steele, Mr. Swackhamer, Mr. Sevison, Ms. Stoess, Mr. Reed, Mr. Phillips, Mr. Westergard

Nayes: Mr. Kjer, Mr. Woods

Abstensions: None

Absent: Mr. Ferrari, Mr. Mangers, Mr. Jacobsen, Mr. Hall

/s/ Roland D. Westergard
Roland D. Westergard, Chairman

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

June 29, 2001

Mr. Michael M. Berger
Berger & Norton
1620 26th Street, Suite 200 S.
Santa Monica, CA 90404-4040.

Re: Tahoe-Sierra Preservation Council, Inc., et al.
v. Tahoe Regional Planning Agency, et al.
No. 00-1167

Dear Mr. Berger:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted limited to the following question: "Whether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the Takings Clause of the United States Constitution?"

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

No. 00-1167 (21)

In The

Supreme Court of the United States

TAHOE SIERRA PRESERVATION COUNCIL, INC.,
a California non-profit corporation
and membership organization, *et al.*,

Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY,
a separate legal entity created pursuant
to Bi-State Compact, *et al.*,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

BRIEF FOR PETITIONERS

MICHAEL M. BERGER*
GIDEON KANNER
BERGER & NORTON
A LAW CORPORATION
1620 26th Street
Suite 200 South
Santa Monica, CA 90404-4040
(310) 449-1000

LAWRENCE L. HOFFMAN
HOFFMAN LAW OFFICES
3000 No. Lake Boulevard
Post Office Box 7740
Tahoe City, CA 96145
(530) 583-8542

Counsel for Petitioners

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the Takings Clause of the United States Constitution?

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PREFACE

Seventeen years ago, some 700 owners of individual, single-family lots in the Lake Tahoe Basin in California and Nevada filed suit, seeking redress for what had, until then, been a three year "temporary" ban on making any productive use of their land. They sued when that freeze mutated into a permanent taking of their land.[1]

Petitioners are not developers. They are individuals who purchased their lots in order to build homes on them – as was then permitted by prevailing zoning and land use regulations. Now, all they can do is look at and walk on "their" land (although the trial judge noted that, as written, TRPA's rules preclude at least some of these landowners from even walking on their own property without first getting a government permit [Pet. App., p. 73]). All other rights – except the "right" to pay taxes – have been *de facto* taken.

Thus, one point must be plainly stated up front: *the purported "temporary" planning "moratorium" was nothing of the sort; it never allowed any use and it never ended.*[2]

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[1] This Court examined the fate of one Lake Tahoe landowner in *Suitum v. Tahoe Reg. Plan. Agency* [TRPA], 520 U.S. 725 (1997), and may recall the utter prohibition on economically productive or beneficial use imposed on landowners in so-called "high hazard" areas under TRPA's 1987 Plan. For earlier litigation, see *Lake Country Estates v. Tahoe Reg. Plan. Agency*, 440 U.S. 391 (1979), in which the Court (through Justice Stevens) held that TRPA could be liable for regulatory takings under 42 U.S.C. § 1983 if its land use policies were too restrictive.

[2] A moratorium is "an authorized delay in . . . development approval." (Dwight H. Merriam & Gurdon H. Buck, *Smart Growth, Dumb Takings*, 29 Environmental Law Rptr. 10746, 10756 [Dec. 1999] [noting that legitimate planning moratoria specifically identify their objectives, are as short as possible, and encourage reasonable interim use of the affected property in order to guard against invalidation or awards of compensation].)

Whatever else one may say about it – and the Court can expect the Tahoe Regional Planning Agency (TRPA) and its *amici curiae* to say a good deal – these landowners did not file suit until *after* the so-called "temporary" freeze had become permanent with the adoption of TRPA's 1984 Plan, leaving them with *no* allowable land uses since 1981. At that point, they sought compensation for both past and future takings of their right to use their homesites.

STATEMENT OF THE CASE

The Petitioners – some 400 owners of individual, lawfully subdivided, single-family residential lots around Lake Tahoe – are mostly married couples who bought their lots years ago for individual retirement, vacation, or permanent homes for themselves and their families.[3] The lots were all located in partially developed residential neighborhoods with paved roads, utility service, and homes built on many of the neighboring lots. All of the landowners bought their lots many years before the regulations challenged here were even being considered. Their expectation to use their land the same as their neighbors was thus as real as it was reasonable. (Compare *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 [1992] [taking occurred when new regulations prevented buyer of last two undeveloped lots in a subdivision from building].)

However, for the past two decades TRPA has prevented Petitioners from building their homes (or anything else) by a series of rolling prohibitions. There were four formal prohibitions, interspersed with informal ones to bridge some gaps, the upshot of which has been a total prohibition of any use since 1981.

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[3] The 700 original plaintiffs have seen their numbers eroded by the passage of time in this Dickensian litigation. Some have died. Others have simply become exhausted.

Lake Tahoe is a unique treasure. That, as the District Court observed, is why people want to build homes near it. (Pet. App., p. 65.) However, in the 1950s and 1960s, its trademark clarity began to lose its luster. Construction of infrastructure (e.g., roads and general grading) for local development was increasing the runoff of dirt and nutrients into the lake, thus increasing the growth of algae and clouding the water. (Pet. App., pp. 62-65.) The solution, curbing development, was obvious and, in 1969, California and Nevada (with the concurrence of Congress and the President) created TRPA to unify land use planning and control in the 501 square mile, bi-state, Lake Tahoe Basin. The problem which has brought this case here is not the regulatory ends, but rather the unconstitutional means employed by TRPA.

TRPA's early planning divided the land into different zones, depending on its steepness, geology, water absorption, etc. Four zones, zones 1 through 3 and SEZ (stream environment zone), were classed as "high hazard" areas, i.e., hazardous to the continued clarity of the lake, and development there was restricted, although not prohibited.

During the 1970s, the lake's clarity continued to deteriorate and the two states had differing views on how to govern the area. After much heated negotiation, the legislatures and governors of California and Nevada, as well as the Congress and President of the United States, agreed on amendments to the interstate compact that created TRPA. (JA 83 is the Compact as amended.)

The tripartite legislative negotiation that resulted in the new Tahoe Compact (effective Dec. 19, 1980) called for a slowdown of development, but not a halt, while TRPA was scheduled to spend the next 18 months devising environmental threshold carrying capacities for the

region and then another year amending its plan to maintain those capacities.[4] Although the Compact recites the necessity "to halt temporarily works of development in the region which might otherwise absorb the entire capacity of the region for further development or direct it out of harmony with the ultimate plan" (JA 105) during that planning period, it only imposed a cap on the number of residential permits that could be issued, not an outright ban on development. And the restriction hammered out in these legislative negotiations was quite specific. For 1980, 1981, and 1982, the Compact limited building permits in each of the cities and counties in the region to the number of building permits each of those entities had issued in 1978, and it listed the precise number allotted to each (JA 106).

But TRPA's first acts in early 1981 went beyond the legislatively negotiated building slowdown. Way beyond. Rather than implement that slowdown, it commanded a freeze. In Ordinance 81-5 (i.e., the fifth ordinance adopted in 1981, and one of the first matters actually considered) TRPA, under the guise of amending its Water Quality Plan, precluded virtually all development in zones 1, 2, 3, and SEZ (i.e., the land involved in this case). At the same time, TRPA candidly asked Congress and the legislatures of California and Nevada to appropriate funds to buy the affected land to alleviate the "hardship" it knew it was inflicting on landowners like those at bench, whose properties were thus *de facto* taken. (See JA 126.)

Ordinance 81-5 was not a "planning" or "time out" moratorium of the kind sometimes used by planning

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[4] In simpler terms, TRPA was to determine the kind and intensity of development that could be tolerated consistent with maintaining the region's significant scenic, recreational, and natural resource values.

agencies to provide needed breathing space.[5] Although dubbed "temporary," it was nothing of the sort; it was actually a substantive regulation, rather than a procedural, planning device, and it made a dramatic change in TRPA's land use plan. Where that plan originally viewed the land development zones in bulk (concluding, for example, that land coverage in zone 1 *throughout the basin* should total 1%), Ordinance 81-5 transferred that limitation to each lot in the area, prohibiting development of more than *1% of any individual lot* in zones 1 and 2, with 5% in zone 3 and zero in SEZ (see JA 169), rendering the lots unusable. One percent coverage on a typical 10,000 square foot lot in these subdivisions would yield only 100 square feet for development – barely a tool shed, surely not a home.

Thus, in reality, Ordinance 81-5 was the first in an unremitting series of consecutive, back-to-back prohibitions. Ostensibly, that initial moratorium was to remain in effect until TRPA adopted amendments to the Regional Plan. A year later, on Aug. 26, 1982, TRPA established environmental threshold carrying capacities which would

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[5] The American Planning Association has identified two bases for planning moratoria. The first is to aid the preparation of a comprehensive plan by precluding developers from obtaining permits that conflict with the plan being drafted. The other is to provide time to construct needed infrastructure. (APA, The Growing Smart Legislative Guidebook [2001] [reproduced in ALI-ABA, Land Use Institute Study Materials 133 [Aug. 16-18, 2001].) Neither describes what happened at bench. As a recent text explains:

> "The proper role of a moratorium is as a stopgap, temporary, emergency measure. . . . Moratoria measures, whatever the type, should not be used as growth control tools or regulatory measures in and of themselves." (Michael A. Zizka, et al., State & Local Government Land Use Liability § 4:4, p. 4-3 [rev. 2000].)

determine the maximum capacity for development of each lot in the area. The Compact required TRPA to complete its work on the Regional Plan within one year of that date. As time passed, TRPA recognized it would not meet that goal, and so, a year later, on Aug. 26, 1983, it adopted Resolution 83-21 (a 90-day temporary moratorium) suspending all permitting activities pending completion of the new Regional Plan. (Pet. App., p. 170.)

But that additional 90-day moratorium was not enough, and TRPA informally allowed it to keep rolling from Nov. 26, 1983 until April 26, 1984, when it finally adopted a new Regional Plan. (Pet. App., p. 75.)[6] The 1984 Plan (Ordinance 84-1; Pet. App., p. 172) made no change in the use prohibition inflicted on these landowners. As the trial court put it, "[w]ith respect to Class 1-3 and SEZ properties . . . nothing much changed. The 1984 Plan provided, at least temporarily, that no projects proposing *any* land coverage at all in Class 1-3 and SEZ would be considered. . . . " (Pet. App., pp. 75-76; emphasis, the court's.)[7] Thus, whatever development it appeared to permit *elsewhere* in the Tahoe Basin, all of the homesites in this litigation remained untouchable.

The State of California (TRPA's staunch ally and defender in this case) sued TRPA when the 1984 Plan was

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[6] The informal extension came about when TRPA's staff realized that the formal moratorium would expire before the new regional plan was completed. Staff told the TRPA Board that it would simply not process any applications unless the Board directed it to do otherwise. (JA 130.) The Board never responded (RT 303), and thus an unauthorized moratorium bridged the gap and continued the ban on all use.

[7] As the 1984 Plan put it: "Development within land capability district 1-3 is not consistent with the goals to manage high hazard lands for their natural qualities and shall generally be prohibited. . . . " (Pet. App., p. 173.) "SEZ lands shall be protected and managed for their natural values." (Pet. App., p. 174.)

adopted because it felt the parts of the new plan dealing with *other landowners* did not comply with the restrictive/protective demands of the Compact. Shortly thereafter, Judge Garcia of the Eastern District of California enjoined TRPA from approving any building projects. That injunction remained in force until TRPA promulgated another revised Regional Plan in 1987. (Pet. App., pp. 76-77.)

But the only effect of Judge Garcia's injunction was to prevent TRPA from allowing those *other* landowners – *not these Petitioners* – to develop their properties. Had there been no such injunction, the 1984 Plan would have precluded all development on Class 1, 2, 3, and SEZ lands anyway.

For these petitioning landowners, the impact of the 1987 Plan (the one this Court reviewed in the *Suitum* litigation) was simply to extend what had gone before. The use prohibitions that had previously been labeled "temporary" in Ordinance 81-5 and then became permanent in the 1984 Plan were slightly revised but remained permanent in the 1987 Plan. *Thus, under none of the various ordinances, resolutions, informal moratoria, or formal plans TRPA issued beginning in 1981, was there anything economically beneficial or productive that these landowners could do with any of their individual homesites.* TRPA thus effectively blocked all construction for the past two decades. The only thing left for the landowners to do was to continue holding bare legal title to something that cannot be productively used, suffer foreclosure, or sell it at bargain basement prices to public buyout entities established by the two states and the federal government for a salvage operation. In the meantime, property taxes and all other burdens of property ownership went on.[8]

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[8] Because of the impact of TRPA's rolling use prohibitions, the majority of the landowners succumbed and were forced to sell their parcels for a fraction of their fair market value to one of these scavenging agencies which paid only the bare residual

Procedurally, this case has been a nightmare for the landowners. They have been in litigation for the better part of two decades and have nothing to show for it but the Ninth Circuit's "thinly disguised contempt" for their constitutional rights.[9]

They have been to the Ninth Circuit four times, and before the District Court on countless occasions.[10] In all those hearings, the lower courts refused to acknowledge the unified nature of TRPA's course of action that resulted in a continuous prohibition of all use from 1981 through the present. Thus, as shown by the grid prepared by the Ninth Circuit (Pet. App., p. 11), the lower courts sliced and diced TRPA's actions into four pieces and analyzed each piece as though the others did not exist. Slicing TRPA's use prohibitions like so much baloney, the District Court refused to consider the bulk of the time period during which all use was prohibited (1984 through the present) (Pet. App., pp. 107-108, 155) – and then the Ninth Circuit eliminated the earlier three years (Pet. App., p. 40).

After a 10-day trial in late 1998, the District Court found liability for a temporary taking for 1981 through

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value of unusable land. The Petitioners seek the difference so they may be made constitutionally whole, a result similar to the one upheld by this Court in *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999).

[9] *TSPC I*, 911 F.2d at 1346 (Kozinski, J., dissenting in part).

[10] This began as two separate suits, one filed in California and one in Nevada (JA 1), pursuant to the venue provisions of the Compact. After separate District Court rulings resulted in separate Ninth Circuit opinions, the matters were consolidated in the Nevada District Court. The earlier Ninth Circuit opinions (all bearing the same name as the case at bench) appear at: 911 F.2d 1331 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991) (referred to in the record as *TSPC I*); 938 F.2d 153 (9th Cir. 1991) (*TSPC II*); and 34 F.3d 753 (9th Cir. 1994), *cert. denied*, 514 U.S. 1036 (1995) (*TSPC III*).

1984, relying on this Court's holdings in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) for the proposition that a regulation that deprives a landowner of all economically beneficial or productive use is a compensable taking, and *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) for the proposition that a temporary taking during a planning moratorium requires compensation the same as a permanent taking. The District Court denied any compensation for the impact of the 1984 Plan, asserting that it was Judge Garcia's injunction that prevented permits from issuing, not TRPA's 1984 Plan. (Pet. App., p. 106.) Finally, the District Court denied any relief from the 1987 continuation of the use prohibitions on the ground that the statute of limitations had run by the time the landowners returned from their first two Ninth Circuit appeals and amended their complaints to seek compensation for the effects of the 1987 event.[11]

The Ninth Circuit affirmed insofar as the District Court *denied* relief, and reversed the limited relief the District Court had *granted*. The Ninth Circuit simply refused to follow this Court's decision in *First English*,

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[11] The court's analysis can hold true only if the 1987 Plan is viewed as an entirely separate "event," rather than a continuation of the use prohibition that TRPA had enforced since 1981. It also required the lower courts to conclude that the landowners had a duty to file new suits against TRPA at the very time they were fighting for their litigational lives pursuing two Ninth Circuit appeals in an effort to reinstate their initial suits. Allowing amendment of the complaints once those suits were finally remanded in 1990 and 1991 would have been proper under the circumstances, and under *United States v. Dickinson*, 341 U.S. 745 (1947) [when a taking occurs through continuous government action, aggrieved landowners are not required to resort to piecemeal litigation, and are not barred by limitations when they sue on the basis of the last, not first, damaging act]. But the lower courts turned a deaf ear to their pleas.

which held that a temporary planning moratorium could be a taking (albeit a temporary one) that requires compensation for the period when use is forbidden.[12] Although both *First English* and the case at bench involved temporary planning moratoria in effect for a finite period of years, the court below asserted that it was "flatly incorrect" that *First English* had any impact here. (Pet. App., p. 29.) Then, viewing each period separately, the court held that each of the properties retained substantial value (because the life of property is theoretically infinite and there could be use left at the end of the moratorium) and therefore there could be no taking, even "assum[ing] *arguendo* [in light of the District Court's findings] that the moratorium prevented all development in the period during which it was in effect." (Pet. App., p. 34, fn. 20).

Needless to say, the Ninth Circuit's reasoning ignores the fact that, while the "life of the land" may be infinite, the lives of its mortal human owners are not, and using this approach simply strips human owners of all they own and enjoy. But, as Justice Holmes put it, the Just Compensation Clause of the Constitution "deals with people, not with tracts of land." (*Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 [1910].) More recently, this Court reaffirmed this concept by stressing that "Property does not have rights. People have rights." (*Lynch v. Household Fin. Co.*, 405 U.S. 538, 552 [1972].)

The landowners' timely Petition for Rehearing and rehearing *en banc* were both denied, with five active Circuit Judges dissenting. (Pet. App., p. 156.) This Court granted certiorari on June 29, 2001. (JA 192.)

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[12] The Ninth Circuit's holding also conflicts with its own earlier decisions in *TSPC I* and *TSPC II*, holding that such a temporary taking *could* be found.

SUMMARY OF ARGUMENT

1. Temporary takings, as this Court put it in *First English*, are not different in kind from permanent takings. This Court has consistently held that the Fifth Amendment's Just Compensation Clause guarantees that any time the government takes private property for public use, compensation will be paid. Size doesn't matter. (*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 [1982].) Neither does time. (*First English.*) Thus, the core fact at bench is that TRPA's actions took the right of user from these landowners. The duration of the taking only affects the *amount* of compensation, not the *entitlement* to compensation.

2. The Ninth Circuit wholly misunderstood this Court's *First English* decision. *First English* involved a local ordinance designed to prevent all use of property for a limited period of time. In that context – and this Court has always said that the factual context of its holdings is vital to their understanding (e.g., *Cohens v. Virginia*, 6 Wheat. [17 U.S.] 264, 399-400 [1821]) – this Court concluded that temporary takings require just compensation, just like permanent takings.

But the Ninth Circuit asserted that, to be compensable, a regulation inflicting a temporary taking must be intended by its drafters to be permanent but thereafter be struck down by a court as unconstitutional or otherwise invalid. In that circumstance, said the Ninth Circuit, a temporary taking occurs and compensation is mandated. But, according to that theory (which simply contradicts *First English*), if a regulation is consciously designed to confiscate the right to all use of private property for a temporary period of time, then no compensation can be due.

The Ninth Circuit misconstrued *First English* in manifold ways, ranging from the context of that decision, to the clear language chosen by this Court, to the earlier decisions relied on as authority, to the dissenting opinion's analysis that the majority rejected. The latter takes

on added meaning, as the Ninth Circuit adopted almost verbatim (although without attribution) the language of the *First English* dissent. (See Pet. App., pp. 160-161.)

3. A conscious governmental decision to freeze temporarily all use of property is the functional equivalent of a conscious governmental decision to condemn temporarily the use of that property. From the property owners' perspective, there is no substantive difference. In either case, they are denied the ability to use their land for a period of time. From the government's perspective, there is no substantive difference either. The government eliminates the property owners' right of use for whatever period it desires.

But doctrinally, the label does not matter, because in analyzing cases at the border of police power and eminent domain, this Court has opted for viewing the reality of each situation and requiring compensation when necessary to vindicate landowners' rights and to protect the government's conscious policy choice from invalidation. This holds true regardless of the factual context[13] or the government's motivation. Indeed, the government's intent to do good (by acting to preserve the environment, for example) only satisfies the "public use" requirement of the just compensation clause, and fortifies the need for compensation when government action infringes on the rights of landowners protected by the Fifth Amendment. (E.g., *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1175 [Fed. Cir. 1994].)

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[13] See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) [cable TV access for apartment tenants]; *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) [public access to private marina]; *Preseault v. I.C.C.*, 494 U.S. 1 (1990) [conversion of railroad easement to recreational trail]; *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) [rodenticide registration]; *Dames & Moore v. Regan*, 453 U.S. 654 (1981) [curtailment of private claims following the Iranian hostage crisis]; and the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974) [massive railroad bankruptcies].

I

THE CONSTITUTION REQUIRES JUST COMPENSATION FOR *ALL* TAKINGS, REGARDLESS OF THEIR LENGTH OR THE MANNER OF THEIR INSTIGATION. THUS, THE ISSUE IS *NOT* WHETHER PROPERTY WAS TAKEN TEMPORARILY, BUT WHETHER IT WAS TAKEN AT ALL.

The question formulated by this Court is:

> "Whether the Court of Appeals properly determined that a *temporary* moratorium on land development does *not* constitute a taking of property requiring compensation under the Takings Clause of the United States Constitution?" (JA 192; emphasis added.)

The short and plain answer to that question is "No." But, with respect, that question – keyed specifically to the way that the Ninth Circuit Court of Appeals chose to deal with this case – may benefit from slight refinement. The real question is whether the Court of Appeals properly determined that government action freezing all productive use of private land does not constitute a taking. Characterizing TRPA's action as a "temporary moratorium" tends to obscure the real issue that springs from the fact that this "moratorium" was not of limited duration, as moratoria are required to be, nor did it permit any use of these properties during its existence, as moratoria need to do in order to avoid becoming temporary takings, nor did it permit any economically viable use of the regulated land upon its expiration.[14] Instead, it was an outright, permanent ban on *all* economically rational use of the Petitioners' land. The "temporary" nature of the first 32-month freeze on all land use was illusory because at the end of the "temporary" moratoria, the

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[14] Standard texts stress the need for all these factors to be present. (See, e.g., 1 Edward Ziegler, Rathkopf's The Law of Zoning & Planning § 11.01[3], p. 11-5 [4th ed., rev. 2001].)

prohibition of all use of Petitioners' land became permanent. Moreover, the "temporary" nature of the freeze is constitutionally irrelevant, and could only impact the amount of compensation due. Justice Brennan put his finger squarely on the issue, even though he did so twenty years ahead of schedule:[15]

> "The fact that a regulatory 'taking' may be temporary, by virtue of the government's power to rescind or amend the regulation, does not make it any less of a constitutional 'taking.' Nothing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable. Nor does the temporary reversible quality of a regulatory 'taking' render compensation for the time of the 'taking' any less obligatory. This Court more than once has recognized that temporary reversible 'takings' should be analyzed according to the same constitutional framework applied to permanent irreversible 'takings.' " (*San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 657 [1981] [Brennan, J., dissenting on behalf of four Justices, but expressing the substantive views of a majority].[16]

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[15] Intriguingly, Justice Brennan wrote this opinion at the very time – early 1981 – that TRPA was adopting Ordinance 81-5, the first of the series of rolling moratoria in this case. Perhaps TRPA should have paid attention.

[16] Justice Rehnquist concurred with four other Justices that the case was not final, but then noted his agreement with Justice Brennan's group of four on the merits. (450 U.S. at 633 [Rehnquist, J., concurring].) Six years later, in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), Chief Justice Rehnquist wrote the opinion for a six-Justice majority that adopted and applied Justice Brennan's *San Diego Gas* dissent. *First English* repeatedly cites Justice Brennan's *San Diego Gas* dissent as authoritative. (482 U.S. at 315; 316, n. 9; 318.)

This section of the brief will analyze the nature of takings and show that the concept of "temporary" is doctrinally and constitutionally beside the point, as the government *always* has it within its power to make *any* taking "temporary" by returning what it took,[17] but that does not eliminate the need for compensation for the duration of the taking. The analysis will then focus on *First English* and show that the Ninth Circuit failed to understand either its factual background or its constitutional teaching.

A

All Takings Require Compensation.

Aside from direct condemnations, there are two kinds of takings, labeled by the manner of their imposition. One is caused by direct physical invasion (e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 [1982]; *United States v. Causby*, 328 U.S. 256 [1946]), the other by regulation (e.g., *First English*; *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 [1999]). But, convenient as they may be for descriptive purposes, these labels are a constitutional irrelevancy; either form requires Fifth Amendment compensation. (*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 [1992].)

In his opinion in *San Diego Gas*, Justice Brennan expounded what might be called a unified field theory of takings jurisprudence. His opinion drew upon all sorts of takings without differentiation to demonstrate the common constitutional element uniting them all, and stressed the "essential similarity of regulatory 'takings' and other 'takings.' " (450 U.S. at 651.)

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[17] In *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 12 (1984) the Court explained that the government may, if it chooses, abandon even a formal condemnation proceeding after trial.

To illustrate the point, that analysis linked a permanent direct condemnation case[18] with flooding cases (both intended[19] and unintended[20]), a navigable servitude case,[21] an aircraft overflight case,[22] a mining regulation case,[23] and temporary direct condemnation cases,[24] among others. (450 U.S. at 651-653, 656-660.) In his pragmatic view, born of a bedrock belief in the Bill of Rights as the individual's shield against governmental overreaching,[25] Justice Brennan viewed all these impositions on private property owners as requiring compensation, and the fact that some of them may have been for temporary periods of time merely affected the amount of compensation that would be due. (450 U.S. at 658-660.) Later court decisions agree. See *Skip Kirchdorfer, Inc. v. United States*, 6 F.3d 1573, 1583 (Fed. Cir. 1993) ["The limited duration of this taking is relevant to the issue of what compensation is just, and not to the issue of whether a taking has occurred."]; *Hendler v. United States*, 952 F.2d 1364, 1376 (Fed. Cir. 1991) ["[T]he fact that [the government's] action was finite went to the determination of compensation rather than to the question of whether a taking had occurred"].

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[18] *Berman v. Parker*, 348 U.S. 26 (1954).

[19] *United States v. Dickinson*, 331 U.S. 745 (1947).

[20] *Pumpelly v. Green Bay Co.*, 13 Wall. [80 U.S.] 166 (1872).

[21] *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

[22] *United States v. Causby*, 328 U.S. 256 (1946).

[23] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

[24] *Kimball Laundry Co v. United States*, 338 U.S. 1 (1949); *United States v. Petty Motor Co.*, 327 U.S. 372 (1946); *United States v. General Motors Corp.*, 323 U.S. 373 (1945).

[25] See Charles M. Haar & Jerold S. Kayden, Landmark Justice 191 (1989).

The genius of this formulation is that it makes the law clear and relatively straightforward to apply.[26] When little or no damage is done, then landowners will either not file suit (this type of litigation is neither pleasant nor inexpensive)[27] or recover little or nothing after trial.[28] Legally, however, it recognizes a freeze on use for what it is: a taking for the duration of the freeze.

The language of the Fifth Amendment is clear and not to be tampered with. When government action interferes severely with the ability of private property owners to use their land in an economically viable fashion, then a taking occurs and compensation must be paid:

> "The language of the Fifth Amendment prohibits the 'tak[ing]' of private property for 'public use' without payment of 'just compensation.' As soon as private property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, the landowner has *already* suffered a

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[26] That would be a welcome respite from the welter of criticisms traditionally heaved in the direction of takings law. For a collection of citations to such scholarly commentary, see Walter, *Appraisal Methods and Regulatory Takings: New Directions For Appraisers, Judges, and Economists*, 63 Appraisal J. 331 (1995).

[27] This Court's own records reveal the lengths to which such litigation can go. The case at bench, for example, was filed in 1984, and resulted in four separate trips to the Ninth Circuit before arriving here. *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999) began its administrative proceedings in 1981 and its litigation in 1986 before concluding in 1999. Another currently active case, *A.A. Profiles v. City of Fort Lauderdale*, 253 F.3d 576 (11th Cir. 2001), began litigation in 1981 and is still going. Similarly, *Florida Rock Products, Inc. v. United States*, 45 Fed. Cl. 21 (1999) was filed in 1982, has resulted in at least five published opinions, and is on appeal again.

[28] As this Court recognized in *Kirby*, 467 U.S. at 19, fn. 29, property owners are not likely to litigate unless the harm for which recompense is sought is substantial.

> constitutional violation, and the self-executing character of the constitutional provision with respect to compensation is triggered. This Court has consistently recognized that the just compensation requirement in the Fifth Amendment is not precatory: once there is a 'taking,' compensation *must* be awarded." (450 U.S. at 654; Brennan, J., dissenting; citations and internal quotation marks omitted; emphasis in original].)

Six years later, when this Court adopted Justice Brennan's theory as its own in *First English*, it analyzed and applied the same mix of takings cases – direct condemnations, along with a variety of physically invasive and regulatory inverse condemnations, permanent and temporary (482 U.S. at 314-319) – and reached the same conclusion: all forms of taking require compensation under the Fifth Amendment. Indeed, this Court emphasized the similarity between direct condemnations for short periods and regulatory takings for similar time periods, and concluded that the two are "not different in kind." (482 U.S. at 318.)

In one of the first lower court applications of *First English*, the Eleventh Circuit Court of Appeals concluded that, "[i]n the case of a temporary regulatory taking, the landowner's loss takes the form of an injury to the property's potential for producing income or an expected profit." (*Wheeler v. City of Pleasant Grove*, 833 F.2d 267, 271 [11th Cir. 1987].) That is an apt description of what happened here. Although evidence of individual impacts was not produced in the liability phase of the trial (see JA 79), TRPA's regulations showed plainly that no use was permitted. (Pet. App., pp. 168-174.) Thus those regulations plainly took the property's use and potential for whatever period of time the Court cares to examine between 1981 (when Ordinance 81-5 was adopted) through the present (when the intervening "temporary" actions, along

with the semi-permanent 1984 Plan and the actually permanent 1987 Plan continued the prohibition on productive use).

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) brought it all together.[29] That case involved South Carolina's effort to protect and preserve its shoreline. After all but two lots in an exclusive oceanfront residential subdivision had been built upon, a new law prevented any further construction. This Court held that the owner of the last two vacant lots was entitled to compensation if the new law precluded all economically beneficial or productive use of his land. (505 U.S. at 1015.) The Court expressly reaffirmed Justice Brennan's *San Diego Gas* analysis that deprivation of economically productive use is, from the owner's viewpoint, the same as taking physical possession. (505 U.S. at 1017.) On remand, the South Carolina Supreme Court found a temporary taking as a matter of law and ordered compensation. (*Lucas v. South Carolina Coastal Council*, 424 S.E.2d 484 [S.C. 1992].)

From his vantage point in academia, Professor Tribe read this case law as meaning that " . . . forcing someone to stop doing things with his property – telling him 'you can keep it, but you can't use it' – is at times indistinguishable, in ordinary terms, from grabbing it and handing it over to someone else." (Laurence Tribe, American Constitutional Law § 9-3 at 593 [2d ed. 1988].) Professor Epstein, viewing things from the opposite end of the ideological spectrum, agrees: "What stamps a government action as a taking is what it does to the property rights of each individual who is subject to its actions:

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[29] Even commentators who argued that *Lucas* established nothing new had to concede that it had synthesized and recompiled much of what had gone before. (E.g., Jerold S. Kayden, *Old Wine in New Bottles*, 46 Land Use Law & Zoning Digest, no. 9, p. 9 [Sept. 1992].)

nothing more or less is relevant." (Richard Epstein, Takings: Private Property and the Power of Eminent Domain 94 [1986].) Proceeding from the scholarly to the mundane, the idea that deprivation of the right to use property is a serious infringement of ownership may be found in even the most general of texts:

> " . . . if one is deprived of the use of his or her property, little but a barren title is left in his or her hands." (63C Am Jur 2d, Property § 3 at 69 [1997].)

"Barren title" is precisely what TRPA left these Petitioners. When it took everything else – regardless of the time period – it became obligated to compensate those whose property was commandeered for the general public good.

B

A Seizure Of The Right To Use Property – Even Temporarily – Requires Compensation.

The Fifth Amendment's just compensation guarantee is not concerned with the niceties of legal form, but with the practical impact of government actions on the owners of private property. (See *United States v. Dickinson*, 331 U.S. 745, 748 [1947] ["Constitution is intended to preserve practical and substantial rights, not to maintain theories. . . . "].) For "the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*." (*Hughes v. Washington*, 389 U.S. 290, 298 [1967] [Stewart, J., concurring] [emphasis in original]; see also *Davis v. Newton Coal Co.*, 267 U.S. 292, 302 [1925] ["The taking was for a public use. The incantation pronounced at the time is not of controlling importance; our primary concern is with the accomplishment."]; *Yuba Goldfields, Inc. v. United States*, 723 F.2d 884, 889 [Fed. Cir. 1983].)

If a government agency were to condemn property temporarily for a passive use, as it does regularly (e.g.,

for a scenic easement), no one would seriously suggest that compensation should not be paid. (See the Court's discussion in *First English*, 482 U.S. at 318, applying this direct condemnation concept to regulatory takings and showing the applicability to regulatory takings of the wartime condemnations of temporary use in *Kimball Laundry Co v. United States*, 338 U.S. 1 [1949]; *United States v. Petty Motor Co.*, 327 U.S. 372 [1946]; and *United States v. General Motors Corp.*, 323 U.S. 373 [1945].) In like vein, when regulations have the same effect (of denying owners the use of their land) through the exercise of the police power, there is no functional difference between the two modes of government action. (*San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 652 [1981] [Brennan, J., dissenting].) Either way, the owners are deprived of the use and enjoyment of their land, and it is that deprivation, not the formal acquisition of title by the government, that is the mechanism of the taking. (*General Motors*, 323 U.S. at 378; *Kirby*, 467 U.S. 1 at 14; see also *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 244 [1984].)

Justice Brennan's *San Diego Gas* analysis also showed that, insofar as the applicability of the Just Compensation Clause is concerned, there is no constitutional content in the temporariness of a taking. In essence, he aptly concluded that *all* takings are temporary, because the government can always revoke a regulation or cease a physical invasion or surrender possession. (450 U.S. at 657, 659-660.)

In *First English*, this Court directly faced the question of whether the length of time made any constitutional difference. The dissent thought it did. (482 U.S. at 322.) The majority, however, decided it did not. (482 U.S. at 318.)

Shortly thereafter, the Court of Appeals for the Federal Circuit explained (through Judge Plager, who spent

his formative years as a property professor) why temporary takings are, from a jurisprudential standpoint, the same as permanent takings:

> "Part of the difficulty here is the confusion that arises in the cases and commentaries over the use of the term 'temporary taking.' The argument in *Agins*, which was finally laid to rest in *First Lutheran Church*, was that a regulatory taking, unlike a physical taking, is by its nature 'temporary.' This is because the government, upon being told the regulation was overly intrusive and therefore a taking (by whatever test), could rescind or amend the regulation.
>
> "It is equally true, however, that the government when it has taken property by physical occupation could subsequently decide to return the property to its owner, or otherwise release its interest in the property. Yet no one would argue that that would somehow absolve the government of its liability for a taking during the time the property was denied to the property owner. All takings are 'temporary,' in the sense that the government can always change its mind at a later time, and this is true whether the property interest taken is a possessory estate for years or a fee simple acquired through condemnation, or an easement of use by virtue of a regulation." (*Hendler v. United States*, 952 F.2d 1364, 1376 [Fed. Cir. 1991].)

Decades earlier, this Court had noted the unfairness that can occur "when the Government does not take [a property owner's] entire interest, but by the form of its proceeding chops it into bits, of which it takes only what it wants, however few or minute and leaves [the property owner] holding the remainder, which may be altogether useless to him. . . . " (*United States v. General Motors Corp.*, 323 U.S. 373, 382 [1945].) That perfectly describes the situation at bench, where TRPA chopped off the right to use each of these lots a slice at a time and left the owners

holding a remainder that was "altogether useless to [them]."

Thus, the real question is whether a taking has occurred, and that depends on the impact of the governmental action on the ability of the landowner to make economically productive use of the land. Justice Holmes put it quite directly for this Court shortly after the turn of the last century, saying "the question is, What has the owner lost?" (*Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 [1910].) As the Federal Circuit Court of Appeals put it more recently, "[n]othing in the language of the Fifth Amendment compels a court to find a taking only when the Government divests the total ownership of the property; the Fifth Amendment prohibits the uncompensated taking of private property without reference to the owner's remaining property interests." (*Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1568 [Fed. Cir. 1994].)

In *Lucas*, where this Court considered the Fifth Amendment implications of a South Carolina regulation that precluded all economically productive use of two subdivided residential parcels, the Court aptly noted "the practical equivalence in this setting of negative regulation and appropriation." (505 U.S. at 1019.)

Most recently, in *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999), this Court upheld a jury's award of compensation for a temporary taking after a city repeatedly denied permission to develop houses on residentially zoned land. Although the Court acknowledged that it had not provided a "definitive statement of the elements of a claim for a temporary regulatory taking" (526 U.S. at 704), it upheld a judgment based on jury instructions drawn from cases dealing with permanent takings. In this most recent temporary taking case, the Court thereby reaffirmed the *San Diego Gas/First English* view that the essential underlying jurisprudence is the same for temporary takings as for all others.

This Court has frequently reverted to the property professors' "bundle of sticks" analogy in takings cases. (E.g., *Kaiser Aetna v. United States*, 444 U.S. 164, 176

[1979].) In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), this Court concluded that even a miniscule physical taking required compensation because "the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." (458 U.S. at 435.) The same is true here. The impact of TRPA's regulations has been to freeze the ability of these landowners to assert any of the ordinary rights of landownership. Assuming the taking to have been "temporary" (although the reality is that freezing for two decades – and counting – is about as permanent as it gets), that temporary action similarly "chops through the bundle, taking a slice of every strand." There are no strands left for the owners to enjoy – unless one considers the joy of paying taxes a beneficial use of the land. (Compare *Arverne Bay Construction Co. v. Thatcher*, 278 N.Y.2d 222, 232 [1938] [confiscation would at least relieve the owners of their tax burdens].)

Thus, whether a taking is permanent or temporary is really not a valid constitutional distinction, and the Ninth Circuit erred prejudicially when it sought to carve out a species of regulatory taking and immunize it from the constitutional mandate of compensation.

C

First English Mandates Compensation For The Impacts Of Deliberate Planning Moratoria That – By Definition – Take The Right To Make Economically Productive Use Of Property. The Ninth Circuit Wholly Misunderstood That.

A primary reason these landowners believe the Ninth Circuit erred in its decision is that that court wholly misunderstood *First English*, and therefore concluded that it could only find Fifth Amendment liability if a permanent regulation were struck down for some reason. Such

liability, it said, *could not* apply to a deliberate moratorium designed for a temporary – even though indefinite – lifetime.[30] Indeed, the idea conjured up below that *First English* can only apply when permanent ordinances are struck down is belied by *First English* itself. There, this Court *refused* to accept the proposition "that no compensable regulatory taking may occur until a challenged ordinance has ultimately been held invalid." (482 U.S. at 320.) In other words, the deliberate – and otherwise valid – taking of the use of land for a period of years can be a temporary taking that requires compensation. (482 U.S. at 315.) The remaining errors in the Ninth Circuit's reading of *First English* are manifold.[31]

First, it is important that *First English* was about a temporary planning moratorium. This Court has repeatedly said that its holdings cannot be divorced from their context, and that their true meaning can only be understood in light of the facts in the underlying case.

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[30] The Ninth Circuit's plain error is highlighted by cases such as *Lomarch Corp. v. Mayor of Englewood*, 237 A.2d 881 (N.J. 1968) [denial of all use of land for one year is a taking and is tantamount to the purchase of an option on the land]; *Steel v. Cape Corp.*, 677 A.2d 634 (Md. App. 1996) [moratorium based on facilities shortage was a taking]; *Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1073 (11th Cir. 1996) [one-year building permit moratorium could be a temporary taking]; *Schiavone Constr. Co. v. Hackensack Meadowlands Dev. Commn.*, 486 A.2d 330 (N.J. 1985) [19 month moratorium could be a temporary taking]; *Eastern Minerals Int'l, Inc. v. United States*, 36 Fed. Cl. 541 (1996) [failure to timely review mining permit application was a compensable taking]; *Keshbro, Inc. v. City of Miami*, ___ So.2d ___, 2001 WL 776555 (Fla. 2001) [closure of apartment complex for one year was a temporary taking].

[31] One respected commentator put it bluntly, saying the Ninth Circuit's "analysis is inconsistent with *First English*." (Steven J. Eagle, *Temporary Regulatory Takings and Development Moratoria: The Murky View From Lake Tahoe*, 31 Envtl. L. Rep. 10224 [2001].)

(E.g., *Cohens v. Virginia*, 6 Wheat. [17 U.S.] 264, 399-400 [1821].)

Lost in the Ninth Circuit's conclusion that *First English* only applies to regulations intended to be permanent but struck down as illegal is the plain fact that *the only thing before this Court in First English was the constitutional consequence of an ordinance that was designed to be in effect for a limited period of time*. Rather than allowing the First English Evangelical Lutheran Church to simply rebuild the camping facility that it lost in a storm, Los Angeles County enacted a moratorium which, under California law, *could not exceed two years*. (See Cal. Gov. Code § 65858.) Thus, the temporary use prohibition was always intended to be of finite duration, and everyone knew the maximum length it could be. The Ninth Circuit simply ignored that.[32]

The error in the Ninth Circuit's view is apparent from this Court's recent decision in *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999). The landowner claimed that the city had taken its property through a series of subdivision denials because that action temporarily took all economically productive use, and also because the city's reasons failed to substantially advance a legitimate state interest. *No city action was ever struck down or invalidated*. The jury simply awarded compensation for the temporary taking caused by that delay, and this Court affirmed.[33]

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[32] Others understand that *First English* involved a moratorium, rather than a truncated permanent restriction. (E.g., Daniel R. Mandelker, Jules B. Gerard & E. Thomas Sullivan, Federal Land Use Law § 2A.05[2][c], p. 2A-64 [rev. 2001].)

[33] The Ninth Circuit's analysis also ignores the *Agins* litigation that preceded *First English*, and on which the latter was based. In *Agins v. City of Tiburon*, 24 Cal.3d 266, 598 P.2d 25 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980), the California Supreme Court held that compensation was not available as a remedy for a regulatory taking. Thus, as this Court acknowledged, the landowner's claims in *First English* "were deemed irrelevant [by the California Court of Appeal] solely because of the California Supreme Court's decision in *Agins* that damages are unavailable to redress a 'temporary' regulatory taking." (*First English*, 482 U.S. at 312.) The challenge in *Agins*, like those in *First English* and in the case at bench, was *not* directed at a "permanent" regulation rendered "temporary" because a court struck it down. Dr. and Mrs. Agins complained about the impact of the city's protracted study of its options to condemn the property for a public park, and its subsequent downzoning. The study period was plainly temporary, and the downzoning was never struck down.

Second, given the finite length of the *First English* moratorium, it would seem inescapable that this Court intended its decision to apply to planning moratoria that were designed to be in effect for only a limited period of time. *Knowing that the suit dealt only with the two year planning moratorium (rather than the permanent development ban that replaced it)* (482 U.S. at 313, fn. 7), the Court said it was dealing with a use prohibition that lasted for "a considerable period of years" (482 U.S. at 322).[34] And the Court noted that, in that context, deprivation of use was the equivalent of condemning a leasehold interest in the property for that period of time, an interest that "may be great indeed." (482 U.S. at 319.)[35]

Third, this Court contrasted that "considerable period" of deliberate use prohibition with the "normal

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[34] The Court was expressly aware that the "temporary" ordinance was adopted in 1979 (482 U.S. at 307) and replaced by a "permanent" ordinance in 1981 (482 U.S. at 313, fn. 7).

[35] In property terms, what is taken is "an estate for years, that is, a term of finite duration as distinct from the infinite term of an estate in fee simple absolute. (While called an estate for years, the term can be for less than a year.)" (*Hendler*, 952 F.2d at 1376.) See also Steven J. Eagle, *Just Compensation For Permanent Takings of Temporal Interests*, 10 Fed. Cir. B.J. 485, 502 (2000): "The term 'taking of a leasehold interest' expresses the relationship best."

delays in obtaining building permits, changes in zoning ordinances, variances, and the like. . . . " (482 U.S. at 321.) Although the Court went no further in explicating "normal delays" in the land use approval process, the carefully chosen illustrations would seem to have no impact at bench. Each of them illustrates a process in which a landowner is participating with the expectation – or at least the possibility – of obtaining development permission at the conclusion.

But the situation must be otherwise where the regulation is a total development freeze, and particularly where the freeze is in the context at bench, where TRPA has always thought that the only way for it to accomplish its task of protecting Lake Tahoe was to prevent all development on the lots that are now before this Court. TRPA has characterized these lots as presenting a "high hazard" to the lake's environmental recovery and preservation. Prohibition cannot by any stretch be considered an exemplar of "normal delay" for landowners working their way through the planning process.[36]

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[36] Moreover, it would seem that such "normal" delays would be less than the two years in *First English*, as that one had been described as "considerable." There is also legislative guidance as to "normal" planning parameters. Such expressions are found in so-called permit streamlining acts which appear in many states. Such statutes "deem" projects approved by operation of law if applications are not acted on in a specified period of time. (See generally 5 Ziegler, Rathkopf's The Law of Zoning and Planning § 66.04 [4th ed. 2001]; 4 Young, Anderson's American Law of Zoning, Subdivision Controls, § 25.16 [4th ed. 1996].) Such statutes were enacted to provide disincentives to governmental sloth. (See generally Annot., *Zoning: Construction and Effect of Statute Requiring That Zoning Application Be Treated As Approved If Not Acted On Within Specified Period Of Time*, 66 A.L.R.4th 1012, 1023.)

While California grants government agencies a leisurely year to review projects (Cal. Gov. Code § 65950), the norm elsewhere is thirty to sixty days. For discussion and application

> "Delays associated with, for example, studies preceding the adoption of rezonings or new comprehensive plans are not a normal delay referenced by the Court in *First English*." (Wendy U. Larsen & Marcella Larsen, *Moratoria as Takings Under* Lucas, 46 Land Use Law & Zoning Dig., no. 6, p. 3 at 5 [1994].)[37]

Fourth, in finally deciding the remedy question that had dogged the Court for the better part of a decade (see *First English*, 482 U.S. at 310-311), the Court obviously believed that a planning moratorium *could* require Fifth Amendment compensation. Otherwise, why pick *that* vehicle (i.e., a case involving an avowedly temporary denial of use) to decide the remedy question? Surely, the Court would not have addressed the issue in *First English* if it believed that the underlying substantive claim *could not* result in a 5th Amendment taking as a matter of law.[38] But it did not.

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of representative statutes, see, e.g., *American Tower, L.P. v. City of Grant*, 621 N.W.2d 37 (Minn. App. 2001) [60 days]; *Gunthner v. Planning Board*, 762 A.2d 710 (N.J.S. 2000) [45 days]; *Romesburg v. Fayette County Zoning Hearing Bd.*, 727 A.2d 150 (Penn. Comm. Ct. 1999) [45 days]; *City of Birmingham Planning Commn. v. Johnson Realty Co., Inc.*, 688 So. 2d 871 (Ala. App. 1997) [45 days]; *Pope v. De Poala*, 574 N.Y.S.2d 869 (1991) [30 days]; *Marandino v. Planning & Zoning Commn.*, 573 A.2d 768 (Conn. App. 1990) [65 days]. It would seem appropriate to utilize such statutes as guidelines for what is "normal" in the planning process, as they contain legislative determinations about how long the planning approval process ought to take.

[37] To the same effect: Michael A. Zizka, et al., State & Local Government Land Use Liability § 4:4, p. 4-10 [rev. 2000].)

[38] Counsel for the County had urged the Court in *First English* to decide that there was no taking, and therefore not decide the remedy issue (Transcript of oral argument, pp. 36-37; 482 U.S. at 312-313), so it cannot be said that the option escaped unnoticed. Nor could it be said that the Court was unaware of this option, as it had employed it in *San Diego Gas* (450 U.S. at 633).

Fifth, the cases on which the Court chiefly relied in *First English* to establish the right to recover for a temporary regulatory taking were direct condemnation cases in which the government condemned the right to use property for a finite period of years. The time periods involved were all about one year, with options to renew. (*United States v. General Motors Corp.*, 323 U.S. 373, 374-375 [1945]; *United States v. Petty Motor Co.*, 327 U.S. 372, 374 [1946]; *Kimball Laundry Co. v. United States*, 338 U.S. 1, 3 [1949].)[39] The Court also relied on *United States v. Dow*, 357 U.S. 17, 26 (1958), which concluded that governmental abandonment of a direct condemnation merely "results in an alteration in the property interest taken – from [one of] full ownership to one of temporary use and occupation [citing the three wartime temporary condemnations cited above for how to value that 'alteration' in the property estate taken]."

That is what the Court evidently contemplated in *First English* when it discussed temporary takings. *That* is the kind of time element the Court envisioned when it noted, with dry understatement, that "[t]he United States has been required to pay compensation for leasehold interests of shorter duration than this [i.e., the period of non-use inflicted on the church]." (482 U.S. at 319.) It thus seems clear that *that* is what the Court had in mind when it said that "[t]hese [direct condemnation] cases reflect the fact that 'temporary' takings which, as here, deny a

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[39] *Petty Motor* was a three-year lease, but it was terminable at the Government's option on each one-year anniversary. See also *United States v. Causby*, 328 U.S. 256 (1946), in which the Government had leased an airport for one year, with options to renew until the end of the war. This Court agreed that overflights from the airport took flight easements over neighboring property, but remanded the matter for the trial court to determine whether they were permanent or temporary and to award compensation accordingly. Thus, the time of the inverse taking was keyed to the temporary nature of the lease by which the United States occupied the facility.

landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." (482 U.S. at 318.)

Sixth, the issue of what the Ninth Circuit called "temporal severance" (Pet. App., p. 21) is not really an issue at all. Or, if it had been an issue, it was resolved by *First English*. As noted earlier, the idea of dealing with property interests of finite duration is something that the law has done since time immemorial. Leasehold estates have long been known, as have temporary tenancies at sufferance. The temporary taking of part of a leasehold requires compensation. (*Bass Enters. Prod. Co. v. United States*, 133 F.3d 893 [Fed. Cir. 1998], *on remand* 45 Fed. Cl. 120 [1999].) Direct condemnations for periods shorter than those involved at bench have also been routinely dealt with.[40] Thus, after it cleared away the procedural underbrush that had prevented it from reaching the compensation issue earlier in the decade, this Court framed the issue clearly:

> "We now turn to the question whether the Just Compensation Clause requires the government to pay for "temporary" regulatory takings." (482 U.S. at 313.)

Whether the taking of such a time-limited interest *could* constitutionally require compensation was a substantial point of disagreement between the *First English*

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[40] As the Federal Circuit Court of Appeals put it:

> "Identification of a specific property interest to be transferred to the Government should pose little problem for property lawyers. Property interests are about as diverse as the human mind can conceive. Property interests may be real and personal, tangible and intangible, possessory and nonpossessory. They can be defined in terms of sequential rights to possession (present interests – life estates and various types of fees – and future interests), and in terms of shared interests. . . . " (*Florida Rock*, 18 F.3d at 1572, fn. 32.)

majority and dissent. The dissent said it could not. The majority said it could. The Ninth Circuit disregarded the majority and applied the dissent. (See Pet. App., p. 160.)

In sum, the decision in *First English* dealt with precisely the kind of regulation as the one held up for examination by the Ninth Circuit at bench. Regardless of some of the other discussion in the opinion, the decision in *First English* was rendered in the context of a two-year planning moratorium that had long since expired by its own terms by the time this Court analyzed it. It is thus a patently false premise to say that *First English* only applies to regulations intended to be permanent but struck down for some constitutional defect. The moratorium involved there was *never* struck down; it was always intended to last for a maximum of two years – and did.

II

FROM A LANDOWNER'S POINT OF VIEW, GOVERNMENT IMPOSITION OF A FREEZE ON ALL ECONOMICALLY PRODUCTIVE USES, ALBEIT TEMPORARILY, IS THE EQUIVALENT OF A TEMPORARY CONDEMNATION OF SUCH LAND. IN EITHER EVENT, THE RIGHTFUL OWNER'S *USE* OF THE LAND HAS BEEN TAKEN, AND JUST COMPENSATION IS DUE.[41]

This case involves TRPA's deliberate legislative decision to forbid the use of the Petitioners' single-family, subdivided lots for the greater good of the Tahoe Basin in particular and the American public in general. In practical terms, that studied and thoughtful action was no

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[41] "From the property owner's point of view, it may matter little whether his land is condemned or . . . whether it is restricted by regulation to use in its natural state, if the effect . . . is to deprive him of all beneficial use of it." (*San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 652 [1981] [Brennan, J., dissenting].)

different than a decision to condemn the right to use that same land – either for a period of years or forever. This section of the brief demonstrates the legal equivalence of such actions and the consequent necessity for compensation to legitimize the freeze under the Fifth Amendment.

A

"Eminent Domain" And "Police Power" Are Really Two Sides Of The Same Coin.

As one commentator put it, Justice Holmes' *Pennsylvania Coal* opinion demonstrated that the eminent domain power and the police power "were really two ends of a continuum that can be called 'governmental power.' " (Gus Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls*, 15 Rutgers L.J. 15, 38 [1983].)[42] Others viewed Justice Brennan's *San Diego Gas* dissent as an updating of Justice Holmes' theory:

> "Stripping away empty formalisms, [Justice Brennan] . . . introduced the pragmatic notion of a *'de facto* exercise of the power of eminent domain,' sensibly suggesting that an overzealous exercise of the police power may concurrently be an exercise of the eminent domain power." (Charles M. Haar & Jerold S. Kayden, Landmark Justice 41 [1989].)

As if to illustrate the point, this Court has repeatedly invoked the just compensation provision of eminent domain to validate police power actions that – without compensation – would be unconstitutional. (See, e.g., *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134 [1974]; *Dames & Moore v. Regan*, 453 U.S. 654, 689 [1981]; *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013 [1984].)

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[42] See also 1 Nichols on Eminent Domain, § 1.42[7], p. 1-269 (rev. 3d ed. 2001): "[T]he police power is but another name for the power of government."

These cases build on the hornbook proposition that, when examining a legislative enactment for constitutionality, that construction should be applied that renders the enactment constitutional, rather than void. (*Fletcher v. Peck*, 6 Cranch [10 U.S.] 87, 128 [1810]; *Regional Rail*, 419 U.S. at 134.)

This Court's solution has been to require eminent domain compensation to validate legislative exercises of the police power that impaired private property rights. (See *Hurley v. Kincaid*, 285 U.S. 95 [1932].) When, for example, Congress decided to establish the Point Reyes National Seashore in northern California, it provided no timetable for the acquisition and seemed in no hurry to appropriate money for that purpose, even as landowners in the area were being abused by questionable government tactics. The U.S. Court of Claims allowed an inverse condemnation action, a process of which it said Congress was aware, and that "was available in case the convergent pressures on any landowner became great beyond its expectation," a process that had "saved the day in many another sticky situation." (*Drakes Bay Land Co. v. United States*, 424 F.2d 574 [Ct. Cl. 1970].) Just so.

That solution properly defers to legislative bodies on matters of policy. Here, for example, TRPA made a policy decision that it was necessary to prevent private use of residentially-zoned and subdivided – but not yet developed – land. Rather than interfere with that policy by enjoining it or overturning it at the instance of some of the impacted landowners, the proper judicial role is to ensure fairness to the landowners by mandating compensation for the period of the freeze. That way, the government gets what its policy makers ordered, but the cost is spread among those that benefit. (See *Armstrong v. United States*, 364 U.S. 40, 49 [1960].)

In similar fashion, when examining the validity of eminent domain actions, this Court has held that the determination of whether property is taken for a "public use" involves "what traditionally has been known as the police power." (*Berman v. Parker*, 348 U.S. 26, 32 [1954].)

This Court's blending of the concepts in order to validate each of them demonstrates the wisdom of Professor Beuscher, who noted several decades ago that "those writers who emphasize the separate air tight, non-overlapping character of the two basic powers – police power and eminent domain – have been too glib." (Joseph Beuscher, *Notes on the Integration of Police Power and Eminent Domain by the Courts: Inverse Condemnation*, in J. Beuscher & R. Wright, Land Use 724 [1969].)[43]

Thirty years after *Berman*, the Court reaffirmed its conclusion when determining whether the Hawaii legislature could authorize the use of the eminent domain power to end a land oligopoly. Most of the private land in Hawaii was owned by a few large estates that leased residential lots to tenants who then built and owned homes on those lots. The Hawaii legislature decided to use the power of eminent domain to condemn the underlying fee title and transfer it to the tenants. The question was whether that was a "public use" that could satisfy the constitutional limitation on the use of this "most awesome power"[44] of government. Speaking for a unanimous eight-Justice Court, Justice O'Connor concluded that in eminent domain law:

> "The 'public use' requirement is thus coterminous with the scope of a sovereign's police powers." (*Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 240 [1984].)

With that simple declarative sentence, the Court unified the juridical underpinnings of the eminent domain power and the police power, and laid the groundwork for

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[43] See also Bauman, *supra*, 15 Rutgers L.J. at 53: " . . . as the 'police power' is adapted to more and increasingly complex applications, the police power/eminent domain dichotomy becomes less useful and more anachronistic." (Collecting citations to numerous commentators who share that view.)

[44] See *City of Oakland v. Oakland Raiders*, 174 Cal.App.3d 414, 419, 220 Cal.Rptr. 153 (1985); *Winger v. Aires*, 89 A.2d 521, 522 (Pa. 1952).

the answer to the question at bench. When a legislative body exercises its discretion to use the eminent domain power, the deference accorded that decision is well nigh conclusive. (*Hawaii Housing Auth.*, 467 U.S. at 240-241.) And that decision automatically invokes the self-executing command to pay just compensation for whatever property is taken in the process. (*Berman*, 348 U.S. at 36; *First English*, 482 U.S. at 315; *Jacobs v. United States*, 290 U.S. 13, 16 [1933].)

In like manner, the conscious decision of a legislative body to act through an exercise of its police power, by deliberately blocking the ability of selected landowners to make any use of their land – for whatever time and whatever reason – is a decision generally committed to that body's discretion. Such a conscious decision should carry with it the same consequence as the conscious decision to authorize condemnation: compensation for any private property taken in the process. In other words, the substantive law of takings turns on the substance of what the government does and how its actions impact on the landowner – not on what alternative label the government chooses to affix to its action. (See *Richmond Elks Hall Assn. v. Richmond Redev. Agency*, 561 F.2d 1327, 1332 [9th Cir. 1977] [applying *Berman* to a regulatory taking]; *City of Austin v. Teague*, 570 S.W.2d 389, 391 [Tex. 1978] [calling the labels "not helpful" because the two concepts "merge at so many places"].)

B

A "Police Power" Freeze On The Use Of Vacant Land And An "Eminent Domain" Taking Are Functionally – and Constitutionally – The Same.

In a typical regulatory taking case, a government agency enacts a regulation that denies landowners the right to use their land productively. This may be by way of a down-zoning, or a permit denial, or a variance denial, or the like. (See, e.g., *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 [1978]; *Agins v. City of Tiburon*, 447 U.S. 255 [1980]; *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 [1981]; *Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172 [1985]; *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 [1986].) But such negative impact is generally not the *raison d'etre* of the regulation. Rather, in such cases, the regulations are primarily designed to readjust the uses of, and relationships among, lands within the jurisdiction. Even so, when the impact of such well-intended regulations is so severe that it denies private landowners economically productive use of their land, then compensation must be paid. (*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 [1992].)

By contrast, when a government agency enacts a freeze (or moratorium) on development, the *sole* purpose of that action is to foreclose (for either a finite or indefinite period of time) the landowners' ability to make *any* use of their land. The reason behind such a freeze may be to permit a "time out" in the face of changed conditions so that the local planners can study the potential uses of land in the area without having development take place during their study period, or it could be to delay further development until public facilities are adequate to serve it, or it could be to preclude development improperly under the guise of a facility shortage. (See, e.g., *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 [1987]; *Lockary v. Kayfetz*, 917 F.2d 1150 [9th Cir. 1990].)

Sometimes moratoria are abused by local agencies, mouthing the words of planning propriety while intending all along to simply prevent use forever – or at least as long as possible.[45] Without any constitutional consequences, such actions will not stop. This is not, of course,

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[45] See, e.g., Mark L. Pollot, Grand Theft and Petit Larceny: Property Rights in America xviii (1993), describing the City of Bolinas, California, that used a bogus water moratorium to prevent development of new homes for decades; Wendy U. Larsen & Marcella Larsen, *Moratoria as Takings Under* Lucas, 46

to say that all moratoria are ill motivated. Nonetheless, without a constitutional counterweight, government agencies – however motivated – have no reason to apply an appropriate cost/benefit analysis to their actions. And that, after all, is the essence of democratic choice: the people should be able to decide whether they (or their planning representatives) "need" to impose severe restrictions so much that they are willing to pay a price for doing so, rather than fobbing off the cost on those who happen to own undeveloped property, and telling them that they – and only they – need to pay this cost as the price of living in a civilized society.

Notwithstanding the Ninth Circuit's view that such moratoria are an essential part of the planning process that should be vigorously protected by the judiciary so that planning agencies can pursue their actions without cost to the general public (Pet. App., p. 27), the situation is jurisprudentially the reverse.

If, *a fortiori*, under cases like *Lucas*, compensation is due even where the government does *not* intend to deny productive land use (but the impact of its regulation does so anyway), the need for compensation should be all the more apparent when prohibition of use is the *sine qua non* of the regulation. The more clearly the government intends to take the use of the land for a period of time, the more clear is the need for Fifth Amendment compensation.[46] This Court long ago held that private property

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Land Use Law & Zoning Dig., no. 6, p. 3 (1994); Garrett Power, *Multiple Permits, Temporary Takings, and Just Compensation*, 23 Urban Lawyer 449 (1991) (Prof. Power discusses improper government tactics in general, and concludes that "Good economics and good government demand compensation. Time is money; cost internalization keeps the locals honest." (*Id.* at 459.)

[46] It is clearer still in a case like this, where the "temporary" freeze on development was replaced by a permanent freeze that continues to this day. In the typical temporary taking, "the

cannot cavalierly be commandeered without payment simply "because the public wanted it very much." (*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 [1922].) The Ninth Circuit's transmogrification of a moratorium from a limited-use planning tool, reserved for special occasions, into a boundless government technique for stultifying all reasonable private land uses, trenches on that basic constitutional doctrine.

C

Good Government Intentions Do Not Vitiate The Need For Compensation – In Fact, They Reinforce It.

The Fifth Amendment is not concerned with the propriety or virtue of the regulators' purpose in freezing the use of private property, or the exigency of the situation that gave rise to the perceived need for it. For a proper exercise of the police or eminent domain power, the underpinning of such a beneficent purpose must exist; otherwise the action is *ultra vires* and void. That much was plainly settled no later than 1922, when this Court examined a statute designed to stop land subsidence caused by underground coal mining and concluded that the prerequisites for exercise of both police power and eminent domain were present:

> "We assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that would warrant the exercise of the power of eminent domain. But the question at bottom is upon whom the loss of

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property is returned to the owner when the taking ends. . . . " (*Yuba Natural Resources, Inc. v. United States*, 904 F.2d 1577, 1580 [Fed. Cir. 1990].) Here, the property – that is to say the right to make productive use of the land – has never been "returned" to its titular owners.

the changes desired should fall." (*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 [1922].)[47]

Pennsylvania Coal was merely one in a long line of decisions in which this Court – speaking from varied points on its ideological spectrum – patiently, and consistently, explained to regulatory agencies that the general legal propriety of their actions and the need to pay compensation under the Fifth Amendment present different questions, and the need for the latter is not obviated by the virtue of the former. Emphasizing the point, the dissenting opinion in *Pennsylvania Coal* had argued the absolute position that a "restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking." (260 U.S. at 417.) Eight Justices rejected that proposition. It is apparently necessary to say so yet again.

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), New York's highest court upheld a statute as a valid exercise of the police power, and therefore dismissed an action seeking compensation for a taking. This Court (through Justice Marshall) put it this way as it reversed:

> "The Court of Appeals determined that § 828 serves [a] legitimate public purpose . . . and thus is within the State's police power. We have no reason to question that determination. *It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that*

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[47] See also *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1571, fn. 28 (Fed. Cir. 1994): "It is necessary that the Government act in a good cause, but it is not sufficient. The takings clause already assumes the Government is acting in the public interest. . . . " More than that, it assumes that the Government is acting pursuant to lawful authority. If not, the action is *ultra vires* and void. (*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 [1952] [unlawful wartime seizure voided]; compare *United States v. Peewee Coal Co.*, 341 U.S. 114 [1951] [compensation mandatory after lawful wartime seizure].)

> *compensation must be paid.*" (*Loretto*, 458 U.S. at 425; emphasis added.)

Similarly, in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), the Corps of Engineers had decreed that a private marina be opened to public use without compensation. This Court disagreed, and explained (through [then] Justice Rhenquist) the relationship between justifiable regulatory actions and the just compensation guarantee of the Fifth Amendment:

> "In light of its expansive authority under the Commerce Clause, there is *no question* but that Congress *could* assure the public a free right of access to the Hawaii Kai Marina if it so chose. *Whether a statute or regulation that went so far amounted to a taking, however, is an entirely separate question.*" (*Kaiser*, 444 U.S. at 174; emphasis added; citations omitted.)

In a similar vein are cases like *Preseault v. I.C.C.*, 494 U.S. 1 (1990) (Brennan, J.), *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (Blackmun, J.), *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (Rehnquist, J.), and the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974) (Brennan, J.). In each of them, this Court was faced with the claim that Congress, in pursuit of legitimate objectives, had taken private property in violation of the Fifth Amendment. The governmental goal in each was plainly legitimate (respectively, the creation of recreational trails, the licensing of pesticides, dealing with the aftermath of the Iranian hostage crisis, and widespread railroad bankruptcy). Nonetheless, the Court did not permit those proper legislative goals to trump the constitutional need for compensation when private property was taken in the process. In each, the Court directed the property owners to the Court of Federal Claims to determine whether these exercises of legislative power, *though substantively legitimate*, nonetheless required compensation to pass

constitutional muster.[48] This bedrock principle of the law of constitutional remedies goes back to the unanimous decision in *Hurley v. Kincaid*, 285 U.S. 95 (1932) (Brandeis, J.), where the Court held that the remedy for a taking *resulting from valid governmental action* is just compensation, not judicial second-guessing of governmental policies and decisions through disruptive injunctions.

In *Nollan v. California Coastal Commn.*, 483 U.S. 825 (1987), the Court (through Justice Scalia) examined California's plan to create an easement along the coast from Mexico to Oregon, and concluded:

> "The Commission may well be right that it is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization. Rather, California is free to advance its 'comprehensive program,' if it wishes, by using its power of eminent domain for this 'public purpose,' see U.S. Const., Amdt. 5; but if it wants an easement across the Nollans' property, it must pay for it." (*Nollan*, 483 U.S. at 841-842.)[49]

And, of course, that concept is the underpinning for the Court's categorical rule that if regulation denies all economically beneficial or productive use of private land, it is a *per se* taking – no matter how beneficial it may be. (*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015

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[48] That is why the Fifth Amendment's just compensation guarantee has been held self-executing. The availability of compensation validates and constitutionalizes the otherwise wrongful government action. (*City of Monterey v. Del Monte Dunes*, 526 U.S. 687 [1999]; *United States v. Clarke*, 445 U.S. 253, 257 [1980].)

[49] See also *Griggs v. Allegheney County*, 369 U.S. 84, 89-90 (1962) (Douglas, J.) [airport operator must pay for noise-impacted property beyond the ends of its runway].

[1992].)[50] That is why, under *Lucas*, a taking *always* occurs when economically productive use is prevented, "*without* case-specific inquiry into the public interest advanced in support of such a restraint." (*Lucas*, 505 U.S. at 1015; emphasis added.)[51]

Thus, for a taking to occur, it matters not whether the regulators acted in good or bad faith, or for good or bad reasons. What matters is the impact of their acts, not the purity *vel non* of their motives. Indeed, if their motives are benign, that only fortifies the need for compensation by confirming that the taking is indeed for a public use as required by the Just Compensation Clause of the Fifth Amendment. Put still another way, the exercise of the power to govern – whether by eminent domain or by far-reaching regulations that *de facto* deprive the owners of their right to make productive use of their land – is not a tort. Nor is it *per se* wrongful – unless the government refuses to pay the just compensation required by the Constitution. That TRPA may not *want* to pay for the impact of its regulations is irrelevant. That is, as this Court put it when TRPA was here four years ago, "simply one of the risks of regulatory pioneering, and the pioneer

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[50] See *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1571, fn. 28 (Fed. Cir. 1994), in which the court noted with understatement: "In *Lucas*, the South Carolina Supreme Court had held that the State's purpose in protecting oceanfront ecology excused the State from liability for its regulatory imposition. The Supreme Court held that was not the correct criterion for takings jurisprudence."

[51] In *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999) this Court (through Justice Kennedy) reaffirmed its position by affirming an award of compensation notwithstanding that the city's purpose in rejecting development was environmental protection. See also last Term's decision in *Palazzolo v. Rhode Island*, ___ U.S. ___ (2001) in which the Court remanded for further consideration a case in which development had been rejected in order to protect coastal wetlands.

here is the agency, not [the landowner]." (*Suitum*, 520 U.S. at 742 [Souter, J.].)

D

TRPA's Conscious Decision To Prohibit The Use Of The Petitioners' Land Requires Compensation To Constitutionalize That Choice.

What the government did here was to bar all economically productive use of the subject residential lots, assertedly for the greater good of the community. Borrowing *Nollan*'s metaphor, TRPA decided to create a benefit for all Americans by severely restricting development around Lake Tahoe, but presented the bill for that public benefit to these landowners alone. Through the enactment of a series of rolling moratoria (now made permanent), TRPA has *de facto* conscripted these landowners as involuntary keepers of vacant land that they may not productively use. TRPA may have had the right to make that decision, but decisions have consequences. The consequence here is that the decision requires compensation to make it valid. Justice Holmes put it plainly for the Court nearly a century ago, in words that seem to have foreshadowed this litigation:

> "[T]he state has an interest independent of and behind the titles of its citizens, in all the earth and air in its domain. It has the last word as to whether its mountains shall be stripped of their forests and inhabitants shall breathe pure air. *It might have to pay individuals before it could utter that word*, but with it remains the final power." (*Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 [1907] [emphasis added].)

This Court echoed the same thought more recently:

> "[R]egulations that leave the owner of land without economically beneficial or productive options for its use – typically, as here, by requiring land to be left substantially in its natural state – carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." (*Lucas*, 505 U.S. at 1018.)

Thus, when this Court analyzed the concept of temporary regulatory takings and compared them to direct condemnations (both temporary and permanent), it found no conceptual difference:

> "These cases reflect the fact that 'temporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." (*First English*, 482 U.S. at 318.)

The temporary regulatory taking in *First English* was the blood relative of the one at bench. It began as a "temporary time out," so that the County could consider what use of the land was in the best public interest after a flood had disclosed dangers in some of its uses, and then was replaced by a permanent ban on new construction (with limited exceptions not available to private citizens). (See 482 U.S. at 307 and 313, fn. 7.)

When *First English* is combined with *Lucas*, the result is clear except to those who insist that government should never have to pay for the impact of its regulations in any event. A respected national text (at least one of whose authors has repeatedly referred to himself as "a police power hawk," i.e., an ardent defender of those who wield the police power) concluded simply:

> "The Supreme Court's *Lucas* decision requires a holding that a per se taking has occurred when a moratorium denies a landowner all reasonable use of his land. . . . " (Daniel R. Mandelker, Jules B. Gerard & E. Thomas Sullivan, Federal Land Use Law § 2A.05[2][c], p. 2A-65 [rev. 2001].)

Other commentators agree:

"In the authors' opinion, the Supreme Court's categorical taking rule in *Lucas* should mandate compensation when moratoria result in the temporary denial of all economically productive or beneficial uses. . . . A moratorium should be considered a categorical taking under *Lucas* when it prohibits all development or the submission of development applications on a given parcel of property that currently has available no economically beneficial or productive uses." (Wendy U. Larsen & Marcella Larsen, *Moratoria as Takings Under* Lucas, 46 Land Use Law & Zoning Dig., no. 6, p. 3 at 6 [1994].)

"[I]n the residential context, a moratorium should be considered a categorical taking where property zoned residential has no existing habitable/saleable structures and is vacant." (Michael A. Zizka, et al., State & Local Government Land Use Liability § 4:4, p. 4-11 [rev. 2000].)

Whether the government chooses to condemn a passive easement over private land, or whether it reaches the same result through regulations that forbid the land's owners to make any use of it themselves, the result is the same and, unsurprisingly, it is governed by the same Constitutional doctrine. In short, the conscious legislative decision to freeze the use of land is the functional equivalent of a conscious legislative decision to acquire a property interest (of whatever duration the legislators believe necessary) by eminent domain. The constitutional imperative of compensation follows in either case.

E

At A Minimum, Compensation Is Due From The Time A Moratorium Has A Substantial Adverse Impact On Landowners.

Petitioners agree with the commentators quoted above that equitable considerations and the logic of *Lucas*

and *First English* mean that a moratorium that precludes, for whatever period of time the regulators wish, all economically productive use of private land is a *per se*, or categorical, taking.

The need for compensation is at least as great for those subject to moratoria as for those whose land is physically invaded. In a sense, the Court resolved that question in *First English* too, when it began its opinion thus:

> "In this case the California Court of Appeal held that a landowner who claims that his property has been 'taken' by a land-use regulation may not recover damages *for the time before it is finally determined that the regulation constitutes a 'taking' of his property.* We disagree, and conclude that in these circumstances the Fifth and Fourteenth Amendments to the United States Constitution would *require compensation for that period.*" (*First English*, 482 U.S. at 306-307; emphasis added.)

In so holding, this Court reaffirmed that takings issues are viewed from the vantage point of the landowner because the purpose of the Bill of Rights is to protect citizens from an overreaching government. That is also why the Just Compensation Clause is treated as "self-executing." (*First English*, 482 U.S. at 315; *United States v. Clarke*, 445 U.S. 253, 257 [1980]; *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 [1999].) Although the government can control the ending date of a temporary taking (see *San Diego Gas*, 450 U.S. at 658), compensation is owed from the time of the adverse impact on the owner, which may be some time before the date of judgment. (*First English*, 482 U.S. at 318-321.)

In the case at bench, the fact that TRPA was engaged in a scheme seeking to preserve a unique American environmental resource does not allow it to achieve that goal at the sole expense of these landowners. As the Court of

Appeals for the Federal Circuit put it (in the context of wetlands preservation):

> "What is not at issue is whether the Government can lawfully prevent a property owner from filling or otherwise injuring or destroying vital wetlands. . . .
>
> "The question at issue here is, when the Government fulfills its obligation to preserve and protect the public interest, may the cost of obtaining that public benefit fall solely upon the affected property owner, or is it to be shared by the community at large." (*Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1175 [Fed Cir. 1994].)

The trial court concluded that TRPA had so much to do, it was reasonable – from TRPA's standpoint – to enact moratoria, and that TRPA could not reasonably have completed its tasks more rapidly. (Pet. App., pp. 114-115.) But that, as this and other courts have repeatedly explained, cannot immunize TRPA from its constitutional duty to compensate when its proper governmental actions conscript private property into public service. Nor is it relevant to whether it was reasonable *from the landowners' standpoint*. It is all well and good to conclude that the government has such an awesome job to do it will take years to accomplish; however, it is something quite different to conclude that the cost of that job will fall only on selected individuals, rather than the public as a whole which gets to enjoy the benefits of the regulation.

In a case like this, where the government enacts a "moratorium" that precludes all economically productive use (as the trial court found [Pet. App., p. 99], and the Ninth Circuit affirmed [Pet. App., p. 40, fn. 30]), the right to use the land is taken *ab initio*. The moratoria at bench lasted from 1981 through 1984 (if one uses the salami slicing analysis of the courts below) or until the present and into the future (if one uses reality as a guidepost), a significant period of time under any analysis. (See *First English*, 482 U.S. at 322, terming the similar temporary moratorium there "considerable.")

The situation could conceivably be different under other circumstances where, for example, the time period is quite short, and its imminent ending date known from the outset so that landowners can plan to deal with it and try to minimize its impact. Under a standard that requires substantial impact, such brief "time outs" might not be takings. But that is not this case. As the trial judge put it:

> "Enacting an unconstitutional ordinance with no plans to end it is different than simply putting a hold on development for a few months while trying to formulate a plan under which development will be possible." (Pet. App., pp. 111-112.)

Under either standard proposed in this brief, i.e., a bright line and doctrinally clear *per se* rule or a substantial impact rule, the trial court properly decided to award compensation to these landowners. That ruling should be reinstated.

CONCLUSION

This Court asked:

> "Whether the Court of Appeals properly determined that a *temporary* moratorium on land development does *not* constitute a taking of property requiring compensation under the Takings Clause of the United States Constitution?" (JA 192; emphasis added.)

The answer, plainly, is that it did not. The Court of Appeals failed to understand or heed this Court's decision in *First English*. The Court of Appeals failed to understand the totality of the injury TRPA inflicted on these landowners. And the Court of Appeals misunderstood its task when it sought to protect the government at the expense of individuals.

This Court has consistently held that it is the Fifth Amendment charge of the judiciary to guard property owners against confiscation engineered not only by crude seizures, but by governmental "exercise[s] in cleverness and imagination" as well (*Nollan v. California Coastal Commn.*, 483 U.S. 825, 841 [1987]), with the clear understanding that such protection would "lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations" (*First English*, 482 U.S. at 321). Placing limits on the government is what the Bill of Rights is all about.

Landowners, no less than other citizens, are entitled to the safeguards of the Bill of Rights. (*Dolan v. City of Tigard*, 512 U.S. 374, 392 [1994].) "After all, if a policeman must know the Constitution, then why not a planner?" (*San Diego Gas*, 450 U.S. at 661, fn. 26; Brennan, J., dissenting.) Why not, indeed.

The Petitioners pray that the Ninth Circuit's decision be reversed so that they may finally recover compensation for the property taken from them two decades ago for the period of time this Court determines to be the period of actionable taking.

Respectfully submitted,

MICHAEL M. BERGER*
GIDEON KANNER
BERGER & NORTON
and
LAWRENCE L. HOFFMAN
HOFFMAN LAW OFFICES

Counsel for Petitioners
**Counsel of Record*

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IN THE
Supreme Court of the United States

TAHOE SIERRA PRESERVATION COUNCIL, INC., *ET AL.*,

Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS

JOHN G. ROBERTS, JR.
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

E. CLEMENT SHUTE, JR.*
FRAN M. LAYTON
ELLISON FOLK
SHUTE, MIHALY
& WEINBERGER LLP
396 Hayes Street
San Francisco, CA 94102
(415) 552-7272

*Counsel of Record

JOHN L. MARSHALL
TAHOE REGIONAL PLANNING
AGENCY
P.O. Box 1038
Zephyr Cove, NV 89448
(775) 588-4547

RICHARD J. LAZARUS
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9129

Counsel for Respondent Tahoe Regional Planning Agency

(Additional counsel on inside cover)

BEST AVAILABLE COPY

Additional counsel:

FRANKIE SUE DEL PAPA
Attorney General
WILLIAM J. FREY
Deputy Attorney General
OFFICE OF THE NEVADA
ATTORNEY GENERAL
100 North Carson Street
Carson City, NV 89701
(775) 687-6532

Counsel for Respondent
State of Nevada

BILL LOCKYER
Attorney General
RICHARD M. FRANK
Chief Assistant Attorney
General
MATTHEW RODRIQUEZ
Senior Assistant Attorney
General
DANIEL L. SIEGEL
Supervising Deputy
Attorney General
CALIFORNIA DEPARTMENT
OF JUSTICE
1300 I Street
P.O. Box 944255
Sacramento, CA 94244
(916) 323-9259

Counsel for Respondent
State of California

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the Takings Clause of the United States Constitution?

PARTIES TO THE PROCEEDINGS

Respondents are the Tahoe Regional Planning Agency ("TRPA"), a regional planning and regulatory agency established by interstate compact, *see* Pub. L. No. 91-148, 83 Stat. 360 (1969); Pub. L. No. 96-551, 94 Stat. 3233 (1980), and the States of California and Nevada. This brief is a joint brief filed on behalf of all respondents. "TRPA" is used herein to refer to all respondents, except that references to regulatory actions of TRPA refer only to that agency.

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BRIEF FOR RESPONDENTS

INTRODUCTION

Because petitioners and their amici take such liberties with it, we begin by quoting the Question Presented: "Whether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the Takings Clause of the United States Constitution?" 121 S. Ct. 2589 (2001). This question—formulated by the Court—limits review to the holding below concerning the temporary moratorium, in effect from August 1981 until April 1984. *See* Pet. App. 40. It does not encompass the other holdings below that petition-

ers sought to challenge, including those concerning the effect of the land use plans adopted in 1984 and 1987. In particular, the Question Presented presupposes that the case does in fact present the question of the constitutional implications of a *temporary* moratorium.

Yet much of what petitioners and their amici have to say explicitly (Pet. Br. 13) and implicitly fights the Question Presented. Thus, they repeatedly argue that what is at issue here is not a temporary moratorium at all, but a permanent ban on development—because of the effect of the 1984 and 1987 plans. *See* Pet. Br. 1, 2, 5, 7, 24. Petitioners *assume* that the 1984 and 1987 plans unconstitutionally deprived them of all use of their property and rendered that property valueless, *see id.* at 6-7, but that claim was rejected by both courts below on, respectively, causation and statute of limitations grounds, *see* Pet. App. 47, 56, and was not included in the Question Presented framed by this Court. Indeed, due to the statute of limitations bar, the record is devoid of any evidence regarding the 1987 Plan—and petitioners themselves made sure that evidence regarding the impacts of that plan was excluded from trial.

The only holding that is before this Court was clearly stated by the court of appeals: "Because the temporary development moratorium enacted by TRPA did not deprive the plaintiffs of all of the value or use of their property, we hold that it did not effect a categorical taking." Pet. App. 40 (footnote omitted). The holding was phrased in those terms because of two decisions petitioners made in bringing their takings claim: *First*, petitioners made "a calculated choice" to mount only a facial challenge to the temporary moratorium. *Id.* at 90; *see id.* at 19; J.A. 80. Such challenges "face an uphill battle" because the challenger must show that the "mere enactment" of the ordinance constitutes a taking. *Suitum* v. *TRPA*, 520 U.S. 725, 736 n.10 (1997).

Second, petitioners chose to base their facial takings claim on the sole ground that the temporary moratorium effected a *per se* taking under *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992), by denying "all economically beneficial or productive use of land." *See* Pet. App. 18. They expressly eschewed any claim under the more generally applicable test set forth in *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978), and accordingly declined to submit evidence concerning "specific factual situations" of the sort pertinent in applying the fact-intensive *Penn Central* analysis. *See* J.A. 80. As the court below explained, "the plaintiffs have stated explicitly on this appeal that they do not argue that the regulations constitute a taking under the ad hoc balancing approach described in *Penn Central*." Pet. App. 19.

In short, the claim that the Ninth Circuit addressed—and the only claim properly before this Court—is that the mere enactment of *any* temporary moratorium, by denying the right to develop property for *any* length of time, *always* constitutes a taking for which compensation is required. That remains petitioners' position before this Court. *See* Pet. Br. 17 ("a freeze on use * * * is a taking for the duration of the freeze"); *id.* at 47 ("a moratorium that precludes, for whatever period of time the regulators wish, all economically productive use of land is a *per se*, or categorical, taking"). In particular, according to petitioners, the "temporary" aspect of the moratorium—the predicate to the Question Presented—is "beside the point" as a matter of law. *Id.* at 15. Petitioners' position has at least the benefit of clarity: a temporary moratorium on development, no matter how brief in duration, no matter how pressing the need for it, and no matter how insignificant its impact—if any—on the value of affected property, must be treated the same as a permanent ban on development—always a *per se* taking for which compensation is required.

What is more, petitioners' sole argument in support of this extreme position is that this Court has already adopted it—in *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304 (1987). As we explain below, *First English* did no such thing—the question whether a temporary moratorium constituted a taking was explicitly recognized by the Court as not being before it in that case. *See id.* at 313. The Court should be taken at its word.

While petitioners argue that the mere enactment of *any* temporary development moratorium is a *per se* taking for which compensation is *always* required, our position is that whether a particular temporary moratorium gives rise to a taking should be assessed, like most takings claims, under the traditional *Penn Central* factors. Because petitioners made a tactical decision in this case to waive any challenge to the moratorium under those factors, the judgment below should be affirmed.

STATEMENT OF THE CASE

1. Lake Tahoe and the Tahoe Regional Planning Agency. Lake Tahoe is an exceptionally pure and beautiful natural resource, the crown jewel of the Sierra Nevada mountain range. It is the largest alpine lake in the world based on all its dimensions, including a remarkable average depth of 1,027 feet and a maximum depth of 1,645 feet. At 6,229 feet above sea level the Lake stretches over 192 square miles, ringed by snow-capped peaks that soar thousands of feet higher. It contains enough water to flood the State of California to a depth of 14 inches.[1]

But such dry statistics do not tell the story. From the first recorded sighting of Lake Tahoe by John C. Fremont on February 14, 1844, visitors have been struck by its remark-

[1] Carl R. Payten & Cameron W. Wolfe, Jr., *Lake Tahoe: The Future of a National Asset*, 52 Cal. L. Rev. 563, 564 (1964); Douglas H. Strong, *Tahoe: An Environmental History* xiii (1984).

able beauty. John C. Fremont, I *Memoirs of My Life* 336 (1886). Mark Twain described the Lake as "a noble sheet of blue water lifted six thousand three hundred feet above the level of the sea * * * . [W]ith the shadows of the mountains brilliantly photographed upon its still surface * * * it must be the fairest picture the whole earth affords." Mark Twain, *Roughing It* 169 (1872), quoted in Pet. App. 60. The Supreme Court of Nevada proclaimed the lake "a national treasure," *Kelly* v. *TRPA*, 855 P.2d 1027, 1034 (1993), *cert. denied*, 510 U.S. 1041 (1994), while the California Supreme Court described the Lake Tahoe Basin as "an area of unique and unsurpassed beauty." *People ex rel. Younger* v. *County of El Dorado*, 487 P.2d 1193, 1194 (1971). In adopting the 1980 Tahoe Regional Planning Compact, the California and Nevada legislatures found that "[t]he region exhibits unique environmental and ecological values which are irreplaceable." J.A. 83; *see also* S. Rep. No. 91-510, at 3-4 (1969) (Lake Tahoe is "famed for its scenic beauty and pristine clarity. * * * Only two other sizable lakes in the world are of comparable quality—Crater Lake in Oregon, which is protected as part of the Crater Lake National Park, and Lake Baikal in the Soviet Union.").

Much of the Lake's storied beauty can be traced to its pristine waters. Lake Tahoe is "oligotrophic," possessing extraordinarily clear and high quality waters because of very low concentrations of sediments, nutrients such as nitrogen and phosphorus, and other contaminants. Pet. App. 62. To quote Twain once again, "I have fished for trout in Tahoe, and at a measured depth of eighty-four feet I have seen them put their noses to the bait and I could see their gills open and shut. I could hardly have seen the trout themselves at that distance in the open air." Mark Twain, *The Innocents Abroad* 144-145 (1869). The result of this "amazing clarity" is water of "an unusually beautiful cobalt blue color." Pet. App. 61.

Unfortunately, "the region's natural wealth contains the virus of its ultimate impoverishment." *County of El Dorado*, 487 P.2d at 1195. Popular with vacationers since the late 1800s, Lake Tahoe was catapulted into the national spotlight by the 1960 Winter Olympic Games, the first to be televised. Strong, *supra*, at 46. That prominence—and the addition of winter attractions to the already growing lure of summer activities—precipitated a dramatic rise in the number of subdivisions created to meet the ever-increasing demand for access to Lake Tahoe. Def. Ex. 86. This development boom led the California Supreme Court to warn as early as 1971 that "[t]oday, and for the foreseeable future, the ecology of Lake Tahoe stands in grave danger before a mounting wave of population and development." *County of El Dorado*, 487 P.2d at 1195; *see generally id.* at 1194-98.

The uncontrolled development in the Lake Tahoe Basin has caused an alarming increase in the levels of nutrients entering the Lake. Development entails covering terrain with impervious surfaces—buildings and asphalt where there had been meadow or field—with the inevitable consequence that run-off from rain or snow melt that previously would have entered the ground now flowed into the Lake. That run-off carries with it the sediment, nutrients, and contaminants that spur the growth of algae and cause eutrophication—a process which, if unabated, will cause levels of algae to continue to increase until the Lake's characteristic color turns "from clear blue to turbid brown." *Tahoe-Sierra Pres. Council* v. *State Water Res. Control Bd.*, 259 Cal. Rptr. 132, 135 (Ct. App. 1989). *See also* Pet. App. 62 ("unless the process is stopped, the lake will lose its clarity and its trademark blue color, becoming green and opaque for eternity").

A number of factors that make Lake Tahoe so extraordinary also make it uniquely vulnerable to this threat. The surrounding mountains enter the Lake at a dramatic slope, increasing the impact of run-off into the Lake and placing a premium on the limited opportunities for run-off to enter the

soil before reaching the Lake. Moreover, unlike most lakes, which can self-purify as fresh water flows in and contaminated water flows out, the amount of water entering and leaving Lake Tahoe is minuscule compared to the total volume of water in the Lake. If the Lake were drained, it would take approximately 650-700 years to be refilled—compared to, for example, 2.6 years for Lake Erie. *See* John Ayer, *Water Quality Control at Lake Tahoe: Dissertation on Grasshopper Soup*, 1 Ecology L.Q. 3, 8 (1971); Pet. App. 63. Thus, if allowed to continue, the eutrophication of the Lake would be irremediable.

In addition to this unique environmental sensitivity, jurisdictional complications add to the challenge of protecting Lake Tahoe. Two States, five counties, a number of municipal governments, and the federal government all have jurisdiction over part of the Lake and the surrounding area. Pet. App. 65.

The first attempt to address environmental impacts to Lake Tahoe through coordinated land use planning came in 1969, when California and Nevada developed and Congress enacted the Tahoe Regional Planning Compact, which created TRPA. Pub. L. No. 91-148, 83 Stat. 360 (1969). In 1972, TRPA adopted, as the basis of its regulatory program, a land capability classification system for the development of property in the Basin. Pet. App. 66. This system classified areas into one of seven districts based on soil types, slope, and vegetation. Land capability districts 1, 2, and 3 are "high hazard" lands (steep, fragile lands), while districts 4 through 7 are "low hazard" lands (relatively flat, stable soils). *Id.* at 66-67. Stream environment zones (called SEZs) were also designated and placed in land capability district 1b. SEZs are areas near streams and similar features that naturally act as filters for much of the debris carried by run-off. *Id.* at 64, 67. This system established limits on the percentage of impervious surface or land coverage permitted in each of the seven land capability districts. *Id.* at 66-67.

There were, however, numerous exceptions to these limits, most significantly for new residential construction, which was allowed even on high hazard lands and SEZs. *Id.* at 67, 90-91. Over 1,600 residential units were approved in 1978 alone. *See* J.A. 106. Not surprisingly, the corresponding deterioration in the Lake's health continued unabated. By 1980, water quality in the Lake was rapidly declining; the rate of algal growth had doubled over the last 20 years, Def. Ex. 211 at 7, and water clarity had decreased between 6-13 percent in the preceding 10 years. Strong, *supra*, at 186-187. The growing tension between development pressures and heightened concern over the fate of the Lake gave rise to "a race-to-develop," Pet. App. 28 n.15, as landowners rushed to develop their property before the imposition of what were anticipated to be more stringent controls. *See id.* at 89 (referring to the "glut of construction in the years just before the Compact was amended in 1980").

2. The Regional Planning Process Instituted Under the 1980 Regional Compact. Dissatisfied with TRPA's ability to control land development under the 1969 Compact, California and Nevada acted to stem the alarming threat to the Lake by drafting amendments to the Compact, which Congress enacted in 1980. Pub. L. No. 96-551, 94 Stat. 3233 (1980) (reprinted at J.A. 83). Among its key provisions, the 1980 Compact required that TRPA, within 18 months, establish environmental threshold carrying capacities necessary to maintain the natural resources of the Basin.[2] The 1980 Compact also mandated that TRPA adopt, within one year following adoption of these thresholds, a new regional

[2] The Compact defined an "environmental threshold carrying capacity" as

> an environmental standard necessary to maintain a significant scenic, recreational, educational, scientific or natural value of the region or to maintain public health and safety within the region. Such standards shall include but not be limited to standards for air quality, water quality, soil conservation, vegetation preservation and noise. [J.A. 87.]

plan that would ensure compliance with them. *See* J.A. 97, 98. Finding that "in order to make effective the regional plan as revised by the agency, it is necessary to halt temporarily works of development in the region which might otherwise absorb the entire capability of the region for further development or direct it out of harmony with the ultimate plan," the new Compact itself contained temporary restrictions on new subdivisions, limitations on new residential permits, limitations on new commercial development, and a prohibition on new apartments. *Id.* at 104-108.

Because these restrictions did not differentiate according to the location of the proposed development, however, TRPA went on to target the primary cause of eutrophication of the Lake: development on high hazard lands and SEZs. Pet. App. 86, 90-91. Therefore, on June 25, 1981, TRPA adopted Ordinance 81-5, which temporarily prohibited most residential and all commercial construction on high hazard lands and SEZs "pending adoption of a revised regional plan under the Tahoe Regional Planning Compact, as amended." J.A. 159; *see id.* at 163-178. Following adoption of Ordinance 81-5, TRPA turned to the task of establishing the required environmental thresholds. After a complex scientific inquiry and significant public debate, these thresholds were adopted on August 26, 1982. Pet. App. 74.

TRPA then had one year to adopt a new regional plan. That period proved inadequate to hammer out the numerous issues presented by the new regional plan and implementing ordinances. As one court summed up TRPA's plight: "Suffice it to say that the extensive public involvement, the numerous Governing Board debates, deliberations, and deadlocks, and the extent of TRPA staff involvement made the process of amending the regional plan an exceedingly complex task." *California* v. *TRPA*, 766 F.2d 1308, 1311 (9th Cir. 1985). Thus, it became clear in August 1983—one year after adoption of the environmental thresholds—that the new regional plan would not be completed by the deadline

mandated by the Compact. "Faced with an impossible deadline, and unsure whether it had the authority to approve any project in the region without the amended plan in place as contemplated by the 1980 Compact, TRPA therefore chose to temporarily suspend, for 90 days, further project approvals." *Id.* at 1311-12. It did so in Resolution 83-21. *See* Pet. App. 170. As debate continued over the new regional plan, Resolution 83-21—always intended to remain in effect until adoption of the regional plan, Pet. App. 33 n.19—was extended on November 17, 1983. J.A. 130.

Together Ordinance 81-5 and Resolution 83-21 constitute the temporary moratorium on development adopted by TRPA until it could complete the process leading to the new regional plan mandated by the 1980 Compact. By its terms this moratorium was to expire upon adoption of that plan and, in fact, TRPA's adoption of the 1984 Plan on April 26, 1984 "superseded" the 32-month moratorium. Pet. App. 106. On May 1, however, a federal district court enjoined implementation of the 1984 Plan and later issued a preliminary injunction barring the issuance of any development permits in the Basin. *Id.* at 76. As a result, TRPA never adopted ordinances to implement the 1984 Plan. *Id.* at 106.[3]

Despite TRPA's vigorous defense of its 1984 Plan, both in the district court and before the court of appeals, the appellate court upheld the preliminary injunction. Pet. App. 76-

[3] Although it was never implemented, the 1984 Plan contained a number of provisions that permitted development on environmentally sensitive lands in the Basin. As found by the district court in an earlier summary judgment decision, "on the face of the Regional Plan, options do exist for development in the Lake Tahoe Basin." *TSPC* v. *TRPA*, 638 F. Supp. 126, 133 (D. Nev. 1986), *aff'd in part and rev'd in part, TSPC* v. *TRPA*, 911 F.2d 1331, 1339 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991). Indeed, one reason the 1984 Plan was enjoined was because of the extent of development it did permit on environmentally sensitive lands—including of single family homes. *See California* v. *TRPA*, 766 F.2d at 1314-16.

77. TRPA thereupon embarked upon a consensus process to develop a successor regional plan. After literally hundreds of public meetings, substantial environmental review, and considerable public debate, that consensus process culminated in the adoption of the 1987 Regional Plan. *See* Def. Exs. 87, 88.

The 1987 Plan established a "markedly different" approach for permitting development, focusing not on land capability classifications but instead on the development potential of each individual lot in the Basin. *TSPC* v. *TRPA*, 34 F.3d 753, 755 (9th Cir. 1994), *cert. denied*, 514 U.S. 1036 (1995). Under this individual parcel evaluation system ("IPES"), lots were individually surveyed and assigned a number based on their suitability for development. *Kelly* v. *TRPA*, 855 P.2d at 1031. Under IPES, some parcels not immediately eligible for development could become eligible over time. *Id.* at 1034. The 1987 Plan also established a system of transferable development rights that created both the incentive to purchase development rights and a strong market for their sale. *Suitum* v. *TRPA*, 520 U.S. at 730, 741-742.

The efforts of TRPA, as well as state and local government, to control the impacts of development on the water quality of the Lake have broadly benefited property owners in the Basin. As the district court determined, if left unabated, the impacts of development on the Lake would have destroyed the very quality that makes the Tahoe Basin such a unique place to own property and to live. Pet. App. 62-63, 86. Without efforts such as these, continued deterioration in the Lake's fabled water quality would have adversely affected the value of property in the Basin. *See* Tr. 8:1534-36 (addressing impacts on adjacent property values of algal growth in lakes). "Faced with the responsibility for solving a serious problem, TRPA took the necessary steps to do so." Pet. App. 91.

3. Proceedings Below. Petitioners challenged each of the actions addressed above—the temporary moratorium, the 1984 Plan, and the 1987 Plan—and alleged that, on their face, TRPA's actions had resulted in a taking of their property. Throughout the litigation, the parties and the courts have consistently and without dissent separated these challenges into four separate time periods (*see* J.A. 74):

- Periods I and II (August 24, 1981 - April 25, 1984) covering the effective duration of Ordinance 81-5 and Resolution 83-21, which together provided for a moratorium on certain development approvals pending adoption of the 1984 Plan;
- Period III (April 26, 1984 - July 1, 1987) covering the period during which the United States District Court for the Eastern District of California enjoined implementation of the 1984 Plan that TRPA adopted pursuant to the 1980 Compact; and
- Period IV covering the time period after TRPA adopted the 1987 Plan on July 2, 1987.

At trial, petitioners made the "calculated choice" (Pet. App. 90) to limit their legal challenge to the claim that TRPA's action with respect to each period prevented any development of their property and therefore constituted, on its face, a *per se* taking under *Lucas*. TRPA argued that its moratorium on development and other actions had not resulted in a taking under either the fact-specific *Penn Central* test or the categorical *Lucas* test. TRPA presented extensive evidence regarding the necessity and importance of its actions to protect the Lake and the economic impact of those actions on properties in the Basin. For the most part, petitioners did not refute this evidence and, in fact, declined to offer any evidence regarding the economic impact of TRPA's regulations on their properties or any other properties in the Basin.

The district court rejected petitioners' takings claim in part and upheld it in part. The court rejected petitioners' claim with regard to Period III (the 1984 Plan), because that Plan had been enjoined by the District Court for the Eastern District of California. "The reason a permit could not be obtained was the T.R.O. and the Preliminary Injunction, not the 1984 Plan." Pet. App. 106. The district court also rejected petitioners' takings claim with regard to Period IV (the 1987 Plan), on the ground that the claim was barred by the applicable statute of limitations. *Id.* at 128-155.

The district court further found that petitioners "did not have reasonable, investment-backed expectations that they would be able to build single-family homes on their land within the six-year period involved in this lawsuit" and had failed to introduce any "evidence * * * regarding the specific diminution in value of any of [their] individual properties." *Id.* at 89, 90. Instead, the court found that "none of the land is completely 'valueless' * * * ." *Id.* at 94. Based on these findings, the court determined that application of the factors set forth in *Penn Central*, 438 U.S. at 124, "clearly leads to the conclusion that there was no taking." Pet. App. 88. Notwithstanding this determination, the trial court felt compelled by this Court's decision in *Lucas* to find that the temporary moratorium in effect during Period I (Ordinance 81-5) and Period II (Resolution 83-21) *had* effected a categorical taking of petitioners' properties. Pet. App. 96-101.

Petitioners appealed the district court's finding that TRPA, through its enactment of the 1984 Plan, did not cause a taking of their property, and they also appealed the district court's finding that TRPA had not waived its statute of limitations defense to petitioners' facial challenge to the 1987 Plan. But while TRPA appealed the district court's finding that the agency's moratorium had resulted in a categorical taking under *Lucas*, petitioners did not appeal either the district court's legal conclusion, or the factual findings underlying the conclusion, that no taking occurred under the

standards set forth in *Penn Central*. Therefore, with respect to the constitutionality of TRPA's 32-month moratorium, the appellate court was presented only with the narrow question of whether TRPA's actions, on their face, resulted in a *per se* taking under *Lucas*.

The court of appeals reversed in part and affirmed in part. The unanimous panel reversed the district court's rulings that TRPA had taken petitioners' properties during Periods I and II; the court concluded that TRPA's reasonable, temporary moratorium on development, allowing the agency time to develop and adopt a regional plan, did not result in a *per se* taking of petitioners' properties. The appellate court upheld the trial court's finding that TRPA had not caused a taking during Period III, and agreed with the district court that the "law of the case" did not preclude TRPA from raising a statute of limitations defense to petitioners' challenge to the 1987 Plan (Period IV). *Id.* at 47-56. The appellate court went on to affirm the district court holding that the challenge was in fact time-barred, noting both that the challenge was filed years after the limitations period had run, and that "the plaintiffs affirmatively decline to argue on appeal that the district court's resolution of that question is incorrect." *Id.* at 56.[4] The court of appeals subsequently denied petitioners' request for rehearing en banc. *Id.* at 156.

In their petition for certiorari, petitioners requested that this Court grant certiorari as to all of the issues addressed in the court of appeals' decision: the temporary moratorium in place during Periods I and II, the Period III injunction on

[4] The court of appeals did not address several of TRPA's defenses that provide alternative bases for upholding the ruling in favor of TRPA: TRPA's actions could not have resulted in a taking under the nuisance exception to the takings doctrine; petitioners' claims are barred by the 60-day statute of limitations under the 1980 Compact; and petitioners could not demonstrate that TRPA took their properties because the agency permitted challenges to land capability designations which could have exempted petitioners' properties from the scope of TRPA's regulations.

implementation of the 1984 Plan, and petitioners' failure to file a timely challenge to the 1987 Plan in effect during Period IV. This Court, however, granted the petition on the sole question, drafted by the Court, of whether the court of appeals properly found that TRPA's temporary moratorium on development did not result in a taking of petitioners' properties. 121 S. Ct. 2589 (2001).

SUMMARY OF ARGUMENT

Nothing in this Court's takings jurisprudence supports the extreme position petitioners urge on this Court. According to petitioners, no matter how pressing the exigency that prompts the enactment of a temporary moratorium, no matter how reasonable the moratorium is in geographic scope, substantive terms, and temporal duration, and no matter how insignificant its impact on the value of affected property, the mere enactment of a temporary moratorium on development will always constitute a *per se* taking of private property under the Takings Clause. Ignoring this Court's repeated admonition that categorical treatment of takings claims is the exception, limited to "two discrete categories of regulatory action," *Lucas*, 505 U.S. 1015, and that, as a general rule, takings claims are instead evaluated under the more nuanced test articulated in *Penn Central*, 438 U.S. at 124, petitioners never explain the legal underpinnings of their theory. Rather, they claim that this Court has already answered the Question Presented in their favor, given its determination in *First English* that all takings of property—whether permanent or temporary—require compensation.

First English does not resolve the issues presented by this case. In *First English*, this Court repeatedly emphasized that it was not reaching the merits of the petitioner's takings claim. Rather, *First English* resolved a long-standing debate regarding the remedy for a regulatory taking. It held that once a court finds that government action *has* resulted in a taking, compensation is the constitutionally required remedy.

TRPA does not dispute, and has not disputed throughout this litigation, that compensation is required whenever a regulation—temporary or permanent—results in a taking. The issue in this case, however, is the logically antecedent one of whether TRPA's temporary moratorium on development resulted in a taking of petitioners' property in the first place. *First English* simply does not address this issue; given its reliance on *First English*, neither does petitioners' brief.

A temporary moratorium on development should not be treated the same as a permanent ban, and nothing in this Court's cases suggests that it should. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), for example, expressly distinguished temporary physical invasions from permanent ones, and held that only the latter gave rise to *per se* takings. The same distinction should be drawn with respect to the *Lucas* category of *per se* takings. A temporary moratorium is readily distinguishable from a permanent ban on economically viable use. As this Court emphasized in *Lucas*, a permanent ban might render the subject property "valueless," 505 U.S. at 1020; that is obviously not true with respect to a temporary moratorium, and petitioners do not contend that it is. Moreover, a permanent ban of the sort at issue in *Lucas* deprives property owners of the basic right to use their property; a temporary moratorium only limits the right to develop the property *immediately*, which has never been regarded as an interest absolutely protected by the Takings Clause. Petitioners' contention that a temporary moratorium is a *per se* taking under *Lucas* because it denies the owner all economically viable use assumes that the pertinent property interest is the right to develop the property *during the period of the moratorium*, but this Court has consistently rejected such efforts to redefine the affected property interest so that it is entirely taken by the challenged regulation.

Concluding that a temporary moratorium is different from a permanent ban on all economically viable use, and accordingly is not a *per se* taking, does not mean that land use planners are free to abuse moratoria, unconstrained by the Takings Clause. Moratoria, like most land use regulations, should be analyzed under the traditional *Penn Central* test. That test mandates a fact-intensive inquiry into the "economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." *Palazzolo* v. *Rhode Island*, 121 S. Ct. 2448, 2457 (2001). Under that test, some moratoria will be found to give rise to a taking, others will not. Those that are not linked to a comprehensive planning process, are more intrusive than required by the particular development pressures, single out particular landowners rather than apply more broadly, last longer than necessary in light of the planning challenges, or sharply diminish property values, may well be vulnerable to takings challenges. Others that are sensible in light of the particular circumstances giving rise to them, help facilitate a broader planning process, are reasonable in scope, duration, and terms, and do not significantly impact property values, do not trigger a requirement to pay compensation. Petitioners chose not to bring a *Penn Central* claim in this case, but instead to rest on their assertion that the mere enactment of any temporary moratorium was always a *per se* taking under *Lucas*. The court of appeals correctly rejected that contention, and its decision should be affirmed.

ARGUMENT

I. THE MERE ENACTMENT OF A TEMPORARY MORATORIUM ON DEVELOPMENT IS NOT A *PER SE* TAKING.

Petitioners' argument in favor of their claim that the mere enactment of any temporary moratorium is automatically a *per se* taking rests on a straightforward syllogism:

- *First English* established that a temporary taking requires compensation, just like a permanent taking.

- *Lucas* established that a regulation that denies all beneficial use of property is a *per se* taking.

- Therefore, a temporary moratorium on development is a *per se* taking for which compensation is required.

The flaw in this syllogism is readily apparent: at no point does petitioners' line of reasoning address the central question—the Question Presented in this case—of whether a temporary moratorium constitutes a temporary taking. Petitioners' logical leap is that because a permanent ban on development is a *per se* taking, a temporary moratorium on development—of one year, one month, or one week—must be so as well. That is an extraordinary assumption, and it is wrong as a matter of law and common sense.

The only support petitioners offer for their assumption is a startling misreading of both the express language and the rationale underlying this Court's opinions in *First English* and *Lucas*. Neither case supports the radical proposition that the mere enactment of a temporary moratorium is always a *per se* taking; indeed, neither case remotely considered the question. It is one thing to say that every time a court finds that government action *has* effected a taking, compensation is required; it is quite another to say that the takings analysis—the test that this Court applies to determine whether a taking has occurred in the first place—treats all government action the same, regardless of the character of the government action—in particular, without regard to whether it is temporary or permanent. That has never been and should not be the law.

A. Except In The Extraordinary Case, Regulatory Takings Claims Are Resolved By Subjecting The Factual Circumstances Of Each Particular Case To A Three-Factor Inquiry.

1. Throughout this case, petitioners have done little more than invoke this Court's decisions in *Lucas* and *First*

English as proof of their takings claims. These decisions, however, do not support petitioners' extreme theory. Neither case overruled the long standing doctrine articulated in *Penn Central*, and recently reaffirmed in *Palazzolo* v. *Rhode Island*, 121 S. Ct. 2448 (2001), which requires courts—except in "extraordinary circumstance[s]" presented only in "relatively rare situations," *Lucas*, 505 U.S. at 1017-18—to evaluate each takings claim based on its specific facts.[5]

Since *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922), this Court has repeatedly opined that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." In applying this test, this Court acknowledged that "[i]n 70-odd years of succeeding 'regulatory takings' jurisprudence, we have generally eschewed any 'set formula' for determining how far is too far, preferring to 'engag[e] in * * * essentially ad hoc, factual inquiries.' " *Lucas*, 505 U.S. at 1015 (quoting *Penn Central*, 438 U.S. at 124).

The framework for those fact-specific inquiries was set forth most prominently in *Penn Central*, which articulated a three-part test focusing on "the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." *Palazzolo*, 121 S. Ct. at 2457 (citing *Penn Central*, 438 U.S. at 124). As the Court reiterated just last Term in *Palazzolo*, whether a taking has occurred typically depends "on a complex of factors" designed to "prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *Id.* at 2457-58 (quoting *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960)). As Justice O'Connor put it, "*Penn Central* does not supply mathematically precise variables, but instead

[5] Amicus Institute for Justice is at least candid enough to acknowledge that its support for petitioners' position entails advocating that *Penn Central* be overruled. Br. 18.

provides important guideposts that lead to the ultimate determination whether just compensation is required." *Id.* at 2466 (concurring opinion).

The *Penn Central* test has been repeatedly cited as the "polestar" of takings analysis. *Id.* at 2466 (O'Connor, J., concurring). In fact, Justice Brennan's dissent in *San Diego Gas & Electric Co.* v. *City of San Diego*, 450 U.S. 621 (1981)—which receives such prominent billing in petitioners' brief—emphasizes the fact-intensive nature of takings analysis. As Justice Brennan explained, "[t]he determination of a 'taking' is 'a question of degree—and therefore cannot be disposed of by general propositions.' " *Id.* at 649 (quoting *Pennsylvania Coal*, 260 U.S. at 416). This Court, therefore—with only "discrete" and carefully circumscribed exceptions, *Lucas*, 505 U.S. at 1015—has repeatedly turned to the factual inquiry mandated by *Penn Central* when evaluating whether government regulation amounts to a taking. *See, e.g., San Diego Gas & Elec.*, 450 U.S. at 648-650 & n.15 (Brennan, J., dissenting).

2. In the face of last Term's reaffirmation of *Penn Central*'s multi-factor analysis, petitioners insist that the takings inquiry focuses on one factor, and one factor alone: "whether a taking has occurred * * * depends on the impact of the governmental action on the ability of the landowner to make economically productive use of the land." Pet. Br. 23. Regardless of the underlying circumstances, all takings are the same under what petitioners term the "unified field theory of takings jurisprudence." *Id.* at 15. *See id.* at 19-20 (existence of taking depends on impact on property; "nothing more or less is relevant") (citation omitted). In particular, petitioners reject the propriety of considering the character of the government action on a case-by-case basis: "The Fifth Amendment is not concerned with the propriety or virtue of the regulators' purpose in freezing the use of private property, or the exigency of the situation that gave rise to the perceived need for it." *Id.* at 39.

But this Court has carved out only two narrow exceptions to the fact-specific consideration set forth in *Penn Central*. First, regulations that result in a "*permanent* physical occupation" of property will be deemed to result in a taking, "without regard to other factors that a court might ordinarily examine." *Loretto*, 458 U.S. at 432 (emphasis added). Second, such "categorical treatment" is also appropriate "where regulation denies all economically beneficial or productive use of land." *Lucas*, 505 U.S. at 1015.

In explaining the rationale for its categorical approach, the Court in *Loretto* emphasized that the character of the government action is central to the takings analysis and that "[w]hen faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking." 458 U.S. at 426-427. Moreover, because of the nature of the intrusion, a permanent physical occupation "presents relatively few problems of proof." *Id.* at 437. In view of the reasoning behind its categorical approach, the *Loretto* Court emphasized that its exception to the generally applicable takings analysis set forth in *Penn Central* was "very narrow." *Id.* at 441.

The categorical approach sanctioned in *Lucas* draws on this Court's ruling in *Loretto*: "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." 505 U.S. at 1017. In such a situation, this Court found that the fact-intensive approach of *Penn Central* was not appropriate because in "the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life.' " *Id.* at 1017-18 (emphasis in original) (quoting *Penn Central*, 438 U.S. at 124). As in *Loretto*, the *Lucas* Court emphasized that this exception to the general balancing test of *Penn Central* would apply only in "relatively rare situations." *Id.* at 1018.

3. Consistent with the narrow approach embodied in these two *per se* rules, this Court has repeatedly and emphatically rejected attempts to expand either *Loretto* or *Lucas*. For example, in *Yee* v. *City of Escondido*, 503 U.S. 519 (1992), this Court rejected the claim that a mobile home rent control ordinance, which limited a landlord's ability to evict tenants and control the sale of mobile homes on its property, resulted in a *per se* taking under *Loretto*. Rather, the Court emphasized that "where the government merely regulates the use of property, compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole." *Id.* at 522-523 (citing *Penn Central*, 438 U.S. at 123-125).

Most recently, in *Palazzolo*, this Court rejected the claim that state regulations had effected a categorical taking under *Lucas*, because the property at issue retained some potential for development—albeit far more limited than the commercial development anticipated by the owner. 121 S. Ct. at 2465. The Court also, however, turned aside an effort by the *State* to establish a categorical rule in place of the traditional *Penn Central* analysis—a new rule that those who purchase property with notice of a particular regulation cannot bring a takings challenge based on the regulation. As the Court put it, "[a] blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken." *Id.* at 2463. *See also id.* at 2467 (O'Connor, J., concurring) ("The temptation to adopt what amount to *per se* rules in either direction must be resisted."). Instead, the case was remanded for consideration of the claim under the *Penn Central* factors. *Id.* at 2465.

"[T]oo blunt an instrument"—an apt characterization of petitioners' proposed rule that *any* temporary moratorium on

development, of whatever length and for whatever purpose, and regardless of its impact on property value, is a *per se* taking. And in fact nothing in *Loretto* or *Lucas* supports petitioners' claim that all temporary moratoria should be lumped with permanent physical invasions and bans on all use as categorical takings. Categorical treatment is a "very narrow" exception to the *Penn Central* fact-specific approach, applicable only in "relatively rare situations." *Loretto*, 458 U.S. at 441; *Lucas*, 505 U.S. 1018. A temporary development moratorium, however, is commonly used "to halt or slow growth until new growth management programs, new comprehensive plans and/or new zoning ordinances can be adopted and implemented." Julian C. Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Control Law* § 9.5 (1988); Robert H. Freilich, *Interim Development Controls: Essential Tools for Implementing Flexible Planning & Zoning*, 49 J. Urban L. 65 (1971).

One of the oldest tools of land use regulation, a moratorium is designed to prevent, on an interim basis, development that would either exacerbate the problem that prompted the planning effort or that would be inconsistent with new regulatory controls once they are enacted. *See Miller* v. *Board of Public Works*, 234 P. 381 (Cal. 1925), *appeal dismissed*, 273 U.S. 781 (1927); *Downham* v. *City Council*, 58 F.2d 784 (E.D. Va. 1932). Even petitioners' amici recognize that such moratoria are "commonplace." Am. Farm Bureau Br. 11. *See Williams* v. *City of Central*, 907 P.2d 701, 706 (Colo. Ct. App. 1995) ("[I]nterim zoning moratoria * * * play an important role in land use planning and are commonly employed."). Expanding *per se* takings analysis to include temporary development moratoria would transform an approach designed to apply to only the most "extraordinary circumstance[s]," *Lucas*, 505 U.S. at 1017, to one that encompasses a well-established and widely used tool of land use planning.

Moreover, the very factor that petitioners contend is "beside the point" (Br. 15)—the fact that what is at issue here is "a *temporary* moratorium on land development," 121 S. Ct. 2589 (emphasis added)—was recognized as being determinative in limiting the scope of the *per se* rule adopted in *Loretto*. The *Loretto* Court specifically distinguished between permanent and temporary physical invasions of property when applying its categorical rule. The Court explained that the taking in *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979), "was not considered a taking *per se*" because it involved an "easement of passage, not * * * a *permanent* occupation of land." 458 U.S. at 433 (emphasis added). The *Loretto* Court then discussed "[a]nother recent case underscor[ing] the constitutional distinction between a permanent occupation and a temporary physical invasion"—*PruneYard Shopping Ctr.* v. *Robins*, 447 U.S. 74 (1980). 458 U.S. at 434. Again, even though that case involved a physical invasion, the takings claim was not subject to *per se* treatment (indeed, it did not succeed) in part because "the invasion was temporary and limited in nature * * * ." *Id.* *See also id.* at 428 (distinguishing "between flooding cases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion, * * * on the other").

The *Loretto* categorical rule was expressly limited to "*permanent* physical occupation of property," and "*temporary* limitations on the right to exclude" were expressly distinguished. *Id.* at 434 & 435 n.12 (emphases added). As the Court explained, "temporary limitations [even if they result in a physical invasion of a property interest] are subject to a more complex balancing process to determine whether they are a taking. The rationale is evident: they do not *absolutely* dispossess the owner of his rights to use, and exclude others from, his property." *Id.* at 435 n.12 (emphasis added).[6]

[6] Petitioners' reliance (Br. 16, 22, 27) on *Hendler* v. *United States*, 952 F.2d 1364 (Fed. Cir. 1991), is misplaced. That case involved a physical invasion of property and the government's installation, with no indication that they would be removed, of wells "some 100 feet deep, lined with plastic and stainless steel, and surrounded by gravel and cement. Each well was capped with a cement casing lined with reinforcing steel bars, and enclosed by a railing of steel pipe set in cement." *Id.* at 1376. As the court concluded, "[t]here is nothing 'temporary' about the wells," which were "at least as 'permanent' in this sense as the CATV equipment in *Loretto*." *Id.* That was more than enough to satisfy the permanency requirement in *Loretto*; the *Hendler* court's further ruminations about the nature of that requirement were dicta inconsistent with *Loretto*. *See Juliano* v. *Montgomery-Ostego-Schoharie Solid Waste Mgmt. Auth.*, 983 F. Supp. 319, 326-327 (N.D.N.Y. 1997).

The *Lucas* Court specifically analogized to *Loretto* when it found that a permanent restriction on development that rendered plaintiff's property "valueless" should be accorded "similar treatment" to the permanent physical invasion at issue in *Loretto*. 505 U.S. at 1020, 1029. In view of the fact that *Loretto* repeatedly emphasized that only permanent physical occupations are subject to its *per se* rule, there is no basis for assuming that the *Lucas* Court intended to ignore this distinction when addressing what it viewed as an analogous regulatory action.[7] There is simply no reason to extend the *Lucas* categorical approach, which applied to a permanent regulation that destroyed all the value of the subject property, to a temporary restriction on development that does not.[8]

[7] To the contrary, the *Lucas* Court—citing *Loretto*—explained that "[w]here '*permanent* physical occupation' of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted 'public interests' involved * * * ." 505 U.S. at 1028 (emphasis added).

[8] Contrary to the implications in petitioners' brief (Br. 26), *City of Monterey* v. *Del Monte Dunes*, 526 U.S. 687 (1999), did not involve a temporary regulation, but rather a permanent denial of development. As the Court explained: "After five years, five formal decisions, and 19 different site plans [the developer concluded that] *the city would not permit development of the property under any circumstances*." *Id.* at 698 (emphasis added).

Nothing about the reasons this Court set forth as the "justification for [the *Lucas*] rule" suggests that the rule would apply to a temporary moratorium. *Lucas*, 505 U.S. at 1017. The first reason was that "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." *Id.* As just explained, categorical treatment of physical occupation takings is expressly limited to *permanent* occupations. The second justification for the *Lucas* rule was that "in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life' in a manner that secures an 'average reciprocity of advantage' to everyone concerned." *Id.* at 1017-18 (emphasis in original) (quoting *Penn Central*, 438 U.S. at 124, and *Pennsylvania Coal*, 260 U.S. at 415). That justification too is inapplicable in the case of a temporary moratorium, because a moratorium permits government to engage in a rational planning process that benefits the very owners subject to the moratorium. The third justification for the *Lucas* approach—that government would not be significantly affected because the situations in which government denies all economic use were "relatively rare," *id.* at 1018—does not apply to the relatively common use of temporary moratoria. *See supra* at 23.

Finally, the fourth justification for the *Lucas* rule—that leaving land "in its natural state" carries "a heightened risk that private property is being pressed into some form of public service," 505 U.S. at 1018—is also inapplicable here. Temporary moratoria do not require that land be permanently left in its natural state. Until the planning process is com-

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The taking that the Court found, based on the Court's view of the egregious nature of the City's actions, was converted to a temporary taking by virtue of the State of California's purchase of plaintiff's property during the pendency of the litigation. *See id.* at 700.

plete, and the range of future uses established, it cannot be said that an agency has opted to prohibit all use of affected properties. *See United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985) ("the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking").[9]

B. Temporary Development Moratoria Neither Destroy All Economically Viable Use Of Property Nor Render Property Valueless, And Therefore Should Not Be Treated As Categorical Takings Under *Lucas*.

1. As recognized by Justice Holmes, the temporary nature of a regulation may be dispositive in assessing its validity: "The regulation is put and justified only as a temporary measure. A limit in time, to tide over a passing trouble, may well justify a law that could not be upheld as a permanent change." *Block* v. *Hirsh*, 256 U.S. 135, 157 (1921) (addressing constitutionality of temporary rent control measure). Petitioners are correct when they assert that "whether a *taking* is permanent or temporary is really not a valid constitutional distinction." Pet. Br. 24 (emphasis added). That is in essence what *First English* held. *See* 482 U.S. at 318, 321. Where petitioners err is in asserting the quite different proposition that whether a *regulation* is permanent or temporary is irrelevant in assessing whether it

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[9] Although the impact of the 1984 and 1987 Plans is not before this Court, and is legally irrelevant given petitioners' facial challenge to the 32-month moratorium, petitioners nonetheless repeatedly characterize those plans as continuing a purported "rolling prohibition" on all economically beneficial use, as if—contrary to their theory—whether the *moratorium* effected a taking depends on the regional plans that followed it. *See, e.g.*, Pet. Br. 1, 2, 5, 7, 24. Neither court below ever addressed the merits of petitioners' takings challenge to the 1984 and 1987 Plans, and no record exists to assess such a challenge on the merits. In any event, what petitioners have to say about the 1984 and 1987 Plans—that they effected "a total prohibition of any use," Pet. Br. 2—is flat wrong. *See supra* at 10-11 & n.3.

gives rise to a taking in the first place. *See* Pet. Br. 14 ("the 'temporary' nature of the freeze is constitutionally irrelevant"); *id.* at 15 ("the concept of 'temporary' is doctrinally and constitutionally beside the point"). That is a different proposition altogether—one that flies in the face of *Penn Central*'s mandate to consider "the character of the government action"—and *First English* has nothing to say about that.

A temporary moratorium on development plainly does not render the subject property "valueless," as did the permanent prohibition at issue in *Lucas*. 505 U.S. at 1020. Rather, a development moratorium simply limits the landowners' ability to make present use of their property. At the risk of stating the obvious, property subject to a temporary moratorium retains value precisely because the moratorium is temporary. Pet. App. 37-38. Property that is worth $1 million because of the uses to which it may be put may become "valueless" when all those uses are permanently barred, *Lucas*, 505 U.S. at 1020, but that same parcel hardly suffers the same fate when uses are suspended for six months, or one year, or three years pursuant to a temporary moratorium. The market reflects the fact that the two situations are dramatically different, both in the character of the government action *and* in its impact on the property owner.[10]

[10] *See, e.g.*, *The Appraisal of Real Estate* 137 (Am. Inst. Real Estate Appraisers, 7th ed. 1978) ("[P]urchasers of land will sometimes pay more for a parcel for its potential use than could be supported by a legally permitted present use. Such purchasers buy in anticipation of a reasonably expected change in the permitted use."); Leslie K. Beckhart, Note, *No Intrinsic Value: The Failure Of Traditional Real Estate Appraisal Methods To Value Income-Producing Property*, 66 S. Cal. L. Rev. 2251, 2287 (1993); *Effect Of Moratorium*, 51A *Fla. Jurisprudence 2d Tax'n* § 1168 (1999) ("The existence of a 'moratorium' is only one factor listed in the valuation statute. It should not be the sole consideration, absent any showing that the moratorium or delayed development is permanent."). *See also City of Newark* v. *Township of Hardyston*, 667 A.2d 193, 199 (N.J. Super. Ct. App. Div. 1995) (applying 10% discount to value of land subject to development moratorium), *certification denied*, 673 A.2d 277 (N.J. 1996); *Growth Properties, Inc.* v. *Klingbeil Holding Co.*, 419 F. Supp. 212 (D. Md. 1976) (land values *increased* during pendency of five-year moratorium on development); *Woodbury Place Partners* v. *City of Woodbury*, 492 N.W. 2d 258, 263 (Minn. Ct. App. 1992), *cert. denied*, 508 U.S. 960 (1993).

Petitioners cannot and do not contend that a temporary moratorium renders the subject property "valueless," as did the ban at issue in *Lucas*. 505 U.S. at 1020. Their argument is instead the surprising one that "the 'value' of property is utterly irrelevant" in assessing whether a temporary moratorium gives rise to a *per se* taking. Pet. App. 92. Petitioners' claim is that *every* temporary moratorium on development is a *per se* taking because it bans all economically beneficial use—even if for only a short time, and even if the property actually *increases* in value because of the perceived benefits of the comprehensive planning facilitated by the moratorium.

This is a sharp departure from *Lucas*. It is true that the Court in that case spoke of regulation that "denies all economically beneficial or productive use of land." 505 U.S. at 1015. But the Court at least as often emphasized that the consequence of the regulation's denial of all economically viable use was to render the property valueless.[11] The fact that property subject to a moratorium retains value suffices to remove such cases from the *Lucas* categorical test.

In his separate concurring opinion in *Lucas*, Justice Kennedy made even more explicit the connection between the "economically viable use" inquiry and the "economic impact" inquiry. He stated that the trial court finding of no economically viable use "appears to presume that the property has no significant market value or resale potential." 505

[11] *See, e.g.*, 505 U.S. at 1007 ("dramatic effect on the economic value"); *id.* at 1016 n.7 ("loss of value" and "diminution in (or elimination of) value"); *id.* at 1017 (" '[F]or what is land but the profits thereof[?]' ") (quoting 1 E. Coke, *Institutes*, ch. 1, § 1 (1st Am. ed. 1812); *id.* at 1019 n.8 ("a complete elimination of value"); *id.* at 1020 (subject property "rendered valueless").

U.S. at 1033-34. Here too, the touchstone of the judicial inquiry is "market value," including "resale potential," which is not eliminated for properties affected by reasonable, temporary moratoria. *See Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 497 (1987) ("our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property"); *Suitum*, 520 U.S. at 731-732, 740-742 (determination as to whether property was deprived of all economically viable use could be made by testimony as to value).[12]

In short, the fact that property subject to a temporary moratorium retains value—unlike the property in *Lucas*, which was found to be "valueless," 505 U.S. at 1020—confirms that temporary moratoria are not subject to *per se* takings treatment under *Lucas*. A property's market value is, after all, a direct reflection of the valuable uses to which the property may be put. It is because of those potential uses that the property is valuable to prospective buyers.

2. Petitioners' repeated assertion that a development moratorium deprives property of all economically viable use is based not on sound economic theory, but rests instead on two erroneous suppositions: an equation of "economically viable use" with the ability *immediately* to develop property,

[12] Lower courts that have considered this issue likewise have found that the *Lucas per se* rule only applies to regulations that render property valueless. *Florida Rock Indus.* v. *United States*, 18 F.3d 1560, 1565 (Fed. Cir. 1994) (whether a categorical taking occurred depended upon property's "residual fair market value," not extent to which property could be developed), *cert. denied*, 513 U.S. 1109 (1995); *Stern* v. *Halligan*, 158 F.3d 729, 735 n.7 (3d Cir. 1998) (denial of all economically viable use under *Lucas* requires the "total destruction of value"); *Mock* v. *Department of Envtl. Res.*, 623 A.2d 940, 946 (Pa. Commw. Ct. 1993) (applying the absolute deprivation rule), *aff'd*, 667 A.2d 212 (Pa. 1995), *cert. denied*, 517 U.S. 1216 (1996); *Zealy* v. *City of Waukesha*, 548 N.W.2d 528, 532 (Wis. 1996) (holding that no taking can occur absent denial of all or substantially all value).

and a conceptualization of the affected property interest as corresponding precisely to the duration of the temporary moratorium. Under petitioners' view, if a property owner cannot develop his property *right now*, it has "no economically viable use." *Lucas*, 505 U.S. at 1020. But nothing in this Court's cases or the economic literature equates economically viable use with *immediate* use.

To put it another way, petitioners' theory that a temporary moratorium on development is a *per se* taking under *Lucas*, because it deprives the landowner of all economically viable use, necessarily assumes that the affected property interest is the right to develop the property *during the period of the temporary moratorium*. Only if the property interest is so defined can the temporary moratorium be said to have rendered *that* interest valueless, triggering coverage under *Lucas*. If the affected interest is viewed as normal fee ownership, a temporary moratorium obviously does not render that interest valueless, or take away all economically viable use—just immediate use.

This Court, however, has rejected the circular notion that, in assessing takings claims, the affected property interest can be defined by reference to the challenged regulation itself. As this Court made clear in *Penn Central*, " '[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." 438 U.S. at 130. The Court reiterated that view in *Keystone Bituminous Coal*, 480 U.S. at 496-502, which involved a takings challenge to a statute requiring a certain amount of coal to be kept in place to support the surface. The Court refused to regard the coal required to be left in place as the pertinent property interest in assessing whether the statute denied the owners of coal rights all economically viable uses. *See also Andrus* v. *Allard*, 444 U.S. 51, 65-66 (1979) ("At least where an owner possesses a full 'bundle' of property rights, the

destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety.").

More recently, in *Concrete Pipe & Products* v. *Construction Laborers Pension Trust,* 508 U.S. 602, 645 (1993), this Court rejected a severance argument substantively indistinguishable from the one petitioners press here. The case considered the claim of an employer that the imposition of liability for withdrawing from a pension plan was a taking, and the employer—like petitioners here—sought to avoid *Penn Central* and treat its case as a categorical taking under *Lucas*. The Court's analysis in turning aside that effort is worth quoting at length:

> We reject Concrete Pipe's contention that the appropriate analytical framework is the one employed in our cases dealing with permanent physical occupation or destruction of economically beneficial use of real property. * * * While Concrete Pipe tries to shoehorn its claim into this analysis by asserting that "[t]he property of [Concrete Pipe] which is taken, is taken in its entirety," we rejected this analysis years ago in *Penn Central*, 438 U.S. at 130-131, where we held that a claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable. [*Id.* at 643-644 (citations omitted).]

A contrary approach would result in finding a taking in virtually every case, because the property interest can always be defined so that it is completely obliterated by the regulation. Some cases posing this so-called "denominator" problem may be more difficult than others, *see generally Palazzolo*, 121 S. Ct. at 2465; *Lucas*, 505 U.S. at 1016-17 n.7, but there is no support for viewing the pertinent property

interest in *this* case as the right to develop the land during the particular period the moratorium was in effect.[13]

3. Petitioners' assumption that property owners have a right immediately to develop their property is inconsistent with the long line of cases finding that reasonable delays in the development process do not result in a taking. In *Agins* v. *Town of Tiburon*, 447 U.S. 255 (1980), for example, this Court applied well-established precedent to determine that, without evidence of unreasonable government conduct, "[m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a "taking" in the constitutional sense.' " *Id.* at 263 n.9 (quoting *Danforth* v. *United States*, 308 U.S. 271, 285 (1939)). The *Agins* plaintiffs argued that their alleged inability to use or sell their property during the pendency of the city's unsuccessful condemnation proceedings constituted a regulatory taking. In rejecting this argument, this Court relied on the fact that the restriction on the property's use caused by the city's "good faith planning activities" was temporary in nature: "Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended." *Id.*

The holding in *Agins* is consistent with this Court's determination in *Riverside Bayview Homes*, 474 U.S. at 127, that the requirement that a property owner obtain a permit "before engaging in a certain use of his or her property does not itself 'take' the property in any sense." Implicit in such a finding,

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[13] Petitioners' analogy to cases involving the condemnation of leaseholds is inapt. What was temporarily barred was development, and while a leasehold is a familiar property interest, *see Lucas*, 505 U.S. at 1017 n.7, the right immediately to develop property is not, and it is *that* right that was affected by the moratorium in this case.

of course, is the premise that the process necessary to obtain a permit does not itself result in a taking.

This line of authority was reaffirmed in *First English*—the basket into which petitioners put all their eggs. We explain below how petitioners misread that case, which did not consider whether a temporary regulation constituted a taking, but rather whether a temporary taking triggered a requirement of compensation. But even in addressing the latter question the Court was careful to note that

> We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us. [482 U.S. at 321.]

Under petitioners' bedrock view that duration is irrelevant, however, they have no explanation for why such "normal delays" present "quite different questions." For what is a delay in obtaining a building permit or a variance but a temporary freeze on development? Petitioners' theory of the case affords no basis for distinguishing a temporary moratorium from the sort of delays the Court carefully set apart in *First English*. Why should a four month moratorium automatically give rise to a *per se* taking, while a six month delay in obtaining a permit not do so? All petitioners have to say is that each of the delays referenced by the Court "illustrates a process in which a landowner is participating with the expectation—or at least the possibility—of obtaining development permission at the conclusion." Pet. Br. 28. But that is certainly the case with respect to temporary moratoria as well. Landowners are typically active participants in the planning process facilitated by such moratoria—petitioners certainly were here, *see* Def. Ex. 320 at 7—and there is no basis for assuming—particularly on this facial challenge—

that any plan adopted after a moratorium would violate the Constitution by prohibiting all use by the owner.[14]

In sum, petitioners are quite wrong in maintaining that "the 'temporary' nature of the freeze is constitutionally irrelevant." Pet. Br. 14. It is relevant in removing temporary moratoria from the carefully circumscribed scope of *per se* takings, and it is relevant on each of the three *Penn Central* factors—the impact on the owner, the reasonable investment-backed expectations of the owner, and the character of the government action. Just as this Court in *Loretto* expressly recognized that a temporary physical invasion was not the same as a permanent physical invasion, and did not trigger the same *per se* treatment under the Takings Clause, so too a temporary development moratorium is not the same as a permanent ban on development, and should not trigger the same *per se* treatment under *Lucas*.[15] Petitioners' sole

[14] Several of petitioners' amici would draw the line between "normal delays" of the sort referred to in *First English* and moratoria that give rise to *per se* takings based on the length of the delay. *See, e.g.*, Small Property Owners Br. 18-19 (need not decide distinction; two decade delay here is excessive); Defenders of Property Rights Br. 16 (arguing, on the same page, that "extraordinary delays" may give rise to a taking, and that "The key question * * * should not be how long a regulation is imposed"); Institute for Justice Br. 5 ("Even if these moratoria were covered [by the 'normal delays' provision], in this instance, the delays in question surely count as 'excessive' and not 'normal' "). If they are correct that whether a moratorium gives rise to a taking depends on its duration, petitioners' *per se* takings claim must fail.

[15] *See, e.g.*, *Williams* v. *City of Central*, 907 P.2d at 704 ("a temporary limitation on property use, resulting from otherwise good faith, reasonable institution of a moratorium to bring about effective governmental decision making does not result in a categorical taking"); *Woodbury Place Partners*, 492 N.W.2d at 263 ("The three-factor inquiry of *Penn Central*, rather than the categorical rule of *Lucas*, applies to determine whether a compensable taking occurred" from temporary moratorium.); *Kelly* v. *TRPA*, 855 P.2d at 1033-34 (same); *Santa Fe Village Venture* v. *City of Albuquerque*, 914 F. Supp. 478, 483 (D.N.M. 1995) (same); *Zilber* v. *Town of Moraga*, 692 F. Supp. 1195, 1202-05 (N.D. Cal. 1988) (same); *Tocco* v. *New Jersey Council on Afford-*

response is that this Court has already ruled otherwise in *First English*. It is to that contention that we now turn.

C. Contrary To Petitioners' Assertions, *First English* Does Not Hold That A Temporary Development Moratorium Is A *Per Se* Taking.

Nothing in *First English*, or, for that matter, Justice Brennan's dissent in *San Diego Gas & Electric*, 450 U.S. 621, requires or even suggests that a temporary moratorium on development be treated as a *per se* taking. Indeed, notwithstanding petitioners' repeated and profound misreading of the Court's holding in *First English,* the Court never reached the merits of the takings issue, even in dictum. In *First English*, the California appellate court had affirmed the trial court's

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able Housing, 576 A.2d 328, 330 (N.J. Super. Ct. App. Div. 1990) (same), *certification denied*, 585 A.2d 401 (N.J.), *cert. denied,* 499 U.S. 937 (1991).

None of the cases cited by petitioners for the proposition that temporary development moratoria can result in a taking supports their *per se* rule. *See* Pet. Br. 25 n.30. Rather, for the most part, these cases either did not involve temporary development moratoria or, where they did, the courts evaluated the moratoria at issue under the *Penn Central* balancing test. *See, e.g., Eastern Minerals Int'l, Inc.* v. *United States*, 36 Fed. Cl. 541 (1996) (relying on *Penn Central* to evaluate takings claim); *Schiavone Constr. Co.* v. *Hackensack Meadowlands Dev. Comm'n*, 486 A.2d 330 (N.J. 1985) (constitutionality of temporary development moratorium turns on its reasonableness); *Lomarch Corp.* v. *Mayor of Englewood*, 237 A.2d 881 (N.J. 1968) (requiring payment of compensation where city land use maps identified plaintiff's property for purchase as public park); *Corn* v. *City of Lauderdale Lakes*, 95 F.3d 1066 (11th Cir. 1996) (remanding for consideration of constitutionality of temporary development moratorium under *Penn Central* factors), *cert. denied*, 522 U.S. 981 (1997); *Steel* v. *Cape Corp.*, 677 A.2d 634 (Md. Ct. Spec. App. 1996) (evaluating permanent zoning ordinance); *Keshbro, Inc.* v. *City of Miami*, ___ So. 2d ___, 2001 WL 776555 (Fla. July 12, 2001) (finding taking by virtue of closure of apartment building but distinguishing the closure from TRPA's moratorium because the moratorium involved regulation of land use, not denial of the dedicated use of property).

dismissal, at the pretrial stage, of the plaintiff's claims for monetary compensation on the ground that California law did not provide for monetary damages for a regulatory taking. In reaching this conclusion, the California courts did not reject the allegation in plaintiff's complaint that its property had been taken, but found that under California law, even if such an allegation were true, the only available remedy was to strike down the challenged regulation. *See First English*, 482 U.S. at 311-312.

Thus, the issue presented to this Court was not what constitutes a taking, but the "remedial question" of whether, *once a taking is established*, compensation can be avoided by the government's "[i]nvalidation of the ordinance * * * [and] converting the taking into a 'temporary' one." *Id.* at 311, 319. The Court had attempted to address this very issue on four previous occasions, but each time finality considerations with respect to the merits of the takings claim had prevented the Court from reaching the remedy issue. *Id.* at 311.[16] In *First English*, however, the California courts had ruled on the available remedy for a taking *assuming* that the complaint's allegations were true, and this Court found that in this procedural posture the remedy issue was at last properly presented. *Id.* at 311-313.

Notwithstanding petitioners' repeated attempts to convey the impression that the Court actually determined that a taking had occurred in *First English,* this Court specifically declined to review the merits of the takings claim. The Court expressly "reject[ed] [the] suggestion that * * * we must * * * resolve the takings claim on the merits before we can

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[16] In *San Diego Gas & Electric*, for example, the majority determined that no final decision had been rendered by the California courts on the merits of plaintiff's takings claim, and that therefore the remedy issue was not properly presented. 450 U.S. at 633. In his dissent, Justice Brennan argued that the remedy issue was properly presented, but similarly declined to address the merits of the takings claim. *Id.* at 646, 661 n.27.

reach the remedial question." *Id.* at 312-313. Leaving no question as to the scope of its holding, this Court stated "[w]e merely hold that where the government's activities *have already worked a taking* of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *Id.* at 321 (emphasis added). The Court, accordingly, expressly stated that it had "no occasion to decide whether the ordinance at issue actually denied appellant all use of its property * * * . These questions, of course, remain open for decision on the remand we direct today." *Id.* at 313.

Indeed, on remand, the California court of appeal explicitly found that the regulation at issue did *not* result in a taking of property, even though it prevented the construction of any structures on the plaintiff's property for a period of two and one-half years.[17] 258 Cal. Rptr. 893, 906 (Ct. App. 1989) ("We do not read the U.S. Supreme Court's decision in *First English* as converting moratoriums and other interim land use restrictions into unconstitutional 'temporary takings' requiring compensation unless, perhaps, if these interim measures are unreasonable in purpose, duration, or scope."), *cert. denied*, 493 U.S. 1056 (1990). That ruling, of course, would not have been possible had this Court already held that the temporary moratorium was in fact a taking.

Petitioners thus confuse this Court's ruling that compensation is the required remedy once a regulatory taking has been found with a ruling on the merits of a takings claim. *First English* simply rejected the doctrine previously adhered to by California that invalidation of an ordinance that had resulted

[17] Contrary to petitioners' claim that the temporary regulation in *First English* was in effect for only two years and therefore was consistent with the time limit on certain types of moratoria in California (Pet. Br. 26), the interim ordinance was in effect for a total of two years and seven months—just one month less than the TRPA moratorium. *See* 258 Cal. Rptr. at 903-904 (interim ordinance adopted January 11, 1979, permanent ordinance adopted August 11, 1981).

in a taking provided a constitutionally sufficient remedy. Although a government agency responsible for a taking may limit its damages by invalidating a regulation, it cannot avoid its constitutional obligation to pay just compensation for the period the restriction was in effect.

That is, however, not to say that *all* temporary restrictions on development result in a temporary taking, regardless of their purpose, length, terms, or impact. At most, the decision in *First English* supports the far narrower proposition that a temporary restriction on development *may* constitute a taking in certain circumstances—a proposition that we do not and the court of appeals below did not dispute. *See* Pet. App. 38, 40. *First English* is properly silent as to the circumstances under which a regulation, including temporary restrictions, goes so far as to result in a taking, explicitly noting that its decision did not address the "quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like * * * ." 482 U.S. at 321. In view of this express statement from the Court, the effort of petitioners and virtually every amici to transform the limited ruling in *First English* into the broad proposition that temporary restrictions on development are the equivalent of a temporary taking must be rejected.

D. Petitioners Themselves Betray Their Discomfort With The Categorical Rule They Urge Upon This Court.

In the end, even petitioners themselves cannot bear the weight of their extreme argument. Although they stress that time does not matter in takings analysis and, likewise, that the factors leading to the moratorium are wholly irrelevant, petitioners undercut their own theory of the case. They do so by repeatedly mischaracterizing the TRPA moratorium as an unduly long series of rolling prohibitions (Pet. Br. 1, 2, 5, 13-14, 24), as unnecessarily stringent because it is stricter than

the limitations set forth in the Compact itself (*id.* at 3-4), and otherwise unreasonable in contrast to a typical moratorium that they acknowledge might serve legitimate planning purposes, such as a "time out" needed for comprehensive planning (*id.* at 4-5 & n.5). We strongly disagree with these characterizations but, more fundamentally, they are all irrelevant under petitioners' own *per se* takings analysis. Petitioners made "a calculated choice" to pursue only a facial *Lucas* claim, Pet. App. 90, and have made clear that the length of a moratorium or its purpose simply do not matter under their theory. Pet. Br. 17, 43, 47. Moreover, the district court made findings supporting the reasonableness of TRPA's moratorium, including its purpose, scope, and duration. Pet. App. 83-92. Petitioners never challenged those determinations, *id.* at 18-19, and it is simply too late in the day to assert such fact-specific claims before this Court.

Finally, petitioners implicitly acknowledge the radical nature of their argument when, in the closing pages of their brief, they make the half-hearted suggestion that this Court develop yet another test (the "substantial adverse impact" test) to evaluate their takings claim. *See* Pet. Br. 46-49. As long as this litigation has been pending, petitioners have never before raised this "alternative test," and it is too late to do so now. *See, e.g., United States* v. *United Foods, Inc.*, 121 S. Ct. 2334, 2341 (2001) ("Although in some instances we have allowed a respondent to defend a judgment on grounds other than those pressed or passed upon below, it is quite a different matter to allow a petitioner to assert new substantive arguments attacking, rather than defending, the judgment when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it.") (citation omitted). What is more, petitioners fail to identify the precedential support or doctrinal rationale for this seat-of-the-pants test, or to explain how it would be applied to the facts of this case, or to any other case. Their "substantial impact rule" (Pet. Br. 49) would appear to

elevate one factor in the *Penn Central* analysis above all others, even though this Court recently rejected such an attempt just last Term in *Palazzolo*. *See* 121 S. Ct. at 2463; *id.* at 2465-66 (O'Connor, J., concurring). For the same reasons that petitioners cannot revive the *Penn Central* claim they strategically waived before the district court and court of appeals, *see infra* at 45-47, they also cannot mount a bob-tailed *Penn Central* claim tailored to their particular facts or—more accurately—their particular version of "facts" they elected not to litigate below.

II. THE FACT-SPECIFIC INQUIRY SET FORTH IN *PENN CENTRAL* AND SUBSEQUENT SUPREME COURT PRECEDENTS PROVIDES THE APPROPRIATE TEST FOR EVALUATING TEMPORARY DEVELOPMENT MORATORIA.

The conclusion that the mere enactment of a temporary moratorium does not always constitute an automatic taking is sufficient to dispose of petitioners' facial claim of a *per se* taking—the only claim at issue here. But contrary to petitioners' assertions, that does not mean that temporary moratoria are somehow immune from constitutional scrutiny under the Takings Clause. That was not the position of the court below, *see* Pet. App. 38, 40, and is not and never has been our position. What it means is that temporary moratoria—like the vast range of regulatory actions—are subject to scrutiny under the generally applicable *Penn Central* test. Whether a *particular* moratorium gives rise to a taking "depend[s] on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." *Palazzolo*, 121 S. Ct. at 2457 (citing *Penn Central*, 438 U.S. at 124). That is a sufficient "constitutional counterweight" (Pet. Br. 38) to constrain government officials in all but the "relatively rare situations" subject to *per se* analysis, *Lucas*, 505 U.S. at 1018, and it is sufficient here.

A. Lower Courts Have Traditionally Applied The *Penn Central* Factors To Assess Temporary Moratoria.

1. In evaluating the character of a government action, *Penn Central* emphasizes that a regulatory program designed to adjust "the benefits and burdens of economic life to promote the public good" is much less likely to result in a taking than government actions that single out an individual property owner to bear a burden that should be shared by the public as a whole. 438 U.S. at 123-124. While recognizing that land use regulation will inevitably burden some property owners more than others, the *Penn Central* Court expressed a strong reluctance to find a taking with respect to regulations that are broadly applied, are part of a comprehensive planning program, and promote the general welfare of the community. *Id.* at 133-135.

A reasonable temporary moratorium designed to facilitate comprehensive planning should fit comfortably within this class of regulations, *see* Robert H. Freilich, 49 J. Urb. L. at 66-67; Elizabeth Garvin & Martin Leitner, *Drafting Interim Development Ordinances: Creating Time to Plan*, Land Use L. Zoning Dig. 3 (June 1996), and in fact courts considering the character of government action in assessing temporary moratoria under *Penn Central* have frequently noted that forestalling a rush to develop to facilitate a rational planning process carries significant benefits for all affected landowners. *See, e.g., Kelly* v. *TRPA*, 855 P.2d at 1035. Conversely, moratoria that are not reasonably related to efforts to establish a comprehensive land use plan may be more likely to be found to give rise to a taking. *See, e.g., Q.C. Const. Co.* v. *Gallo,* 649 F. Supp. 1331, 1337-38 (D.R.I. 1986) (finding that an unreasonable moratorium on sewer connections that was not part of a plan to remedy the town's sewer problems and that substantially reduced the value of plaintiffs' property resulted in a taking), *aff'd*, 836 F.3d 1340 (1st Cir. 1987).

The scope of any moratorium is also pertinent in assessing the character of the government action. A moratorium that applies broadly over a large geographic area so that an agency may develop a land use plan to serve an entire community is less likely to present the risk that a small group of individuals is being forced to "bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong,* 364 U.S. at 49. *See* Garvin & Leitner, *supra*, at 4; Pet. App. 86 ("TRPA's actions had wide-spread application, and were not aimed at an individual landowner"). Conversely, a more focused moratorium or one with a more discrete impact may be more likely to be found to constitute a taking.

The tailoring of the development restrictions in a moratorium is also pertinent in weighing the character of the government action under *Penn Central*. A moratorium should correspond to the interim development threat creating the need for it. *See* Garvin & Leitner, *supra*, at 4 (identifying type of development and geographic area as key considerations in crafting effective interim development controls). Here TRPA adopted limits on the precise type of development that most threatened the Lake. As the district court specifically found: "Lake Tahoe was losing its clarity due to increased development in the Basin, especially in high hazard lands. Thus limiting development on high hazard lands is a direct and reasonable way to combat the problem." Pet. App. 90-91. *See id.* at 86 ("it is difficult to see how a more proportional response could have been adopted"). A moratorium on types of development that do not threaten the integrity of the pending planning process would be more likely to give rise to a taking.

And, of course, the duration of any temporary moratorium is an important factor in assessing the character of the government action, as well as the economic impact on property owners. *See, e.g., Schiavone Const. Co.*, 486 A.2d at 333 ("courts should consider the reasonableness of the

duration of any moratorium on development"). The complexity of the underlying planning issues is pertinent in weighing the reasonableness of the duration—three years may be reasonable in some cases; six months may be too long in others. Certainly we agree with petitioners (Pet. Br. 37) that temporary planning moratoria that are *not* tied to an ongoing planning process, or that are abused to block development indefinitely, should be more likely to give rise to a taking. We doubt the instances of such abuse are as widespread as petitioners seem to suppose, but the *Penn Central* analysis certainly is flexible enough to smoke out instances in which the land use planning process has gone awry and a permanent ban masquerades as a temporary moratorium, while at the same time affording adequate time for situations such as this case, where underlying scientific complexity, multiple jurisdictional interests, the need for broad public participation (including by affected property owners themselves), and the high environmental stakes combine to pose a more involved planning challenge. *See* Pet. App. 74.

2. Courts also have no difficulty assessing the economic impact on property owners caused by temporary moratoria. As noted, an important consideration in weighing this aspect of the *Penn Central* test is the recognition that a moratorium's impact on value is mitigated by its temporary nature. *See Williams*, 907 P.2d at 704; *Kelly*, 855 P.2d at 1034. Temporary development limitations imposed by a moratorium do not prohibit all development, but merely delay it pending adoption of a plan or other land use regulation. That delay may result in a diminution in the value of the property, *see City of Newark*, 667 A.2d at 199, and such diminution is a pertinent factor in the *Penn Central* analysis. In certain circumstances, the delay may have a significant adverse impact on value. *See, e.g., Eastern Minerals Int'l*, 36 Fed. Cl. at 550 (finding taking under *Penn Central* when "[t]he Government delayed consideration of plaintiff's permit application for an extraordinary length of time"). At the

same time, the prospect of future orderly development within the framework of a comprehensive land use plan may increase the value of property subject to a temporary moratorium. In particular, a moratorium that halts a chaotic race to develop—a race in which not all property owners will be winners—and allows the substitution of a more coherent process of controlled growth, could well increase property values across the board. Again, the *Penn Central* test allows consideration of each unique situation on its own facts.

Courts have also considered the impact of temporary moratoria on reasonable investment-backed expectations. Excessive delays in the development process may interfere with a property owners' reasonable, investment-backed expectations, but property owners have no right to *immediate* development of their property. Normal fluctuations in value during the planning process are "incidents of ownership," and do not give rise to a taking. *Agins*, 447 U.S. at 263 n.9; *Riverside Bayview*, 474 U.S. at 127. Here again what is reasonable will vary from case to case. In this case, for example, the district court found that property owners in the Tahoe Basin held their property for an average of 25 years prior to development. In light of that fact, the 32-month delay caused by Ordinance 81-5 and Resolution 83-21 did not unduly interfere with any reasonable investment-backed expectations the owners might have had. Pet. App. 88-89.

B. Petitioners Cannot Pursue A *Penn Central* Takings Claim Before This Court.

1. Having relied exclusively on the facial claim that TRPA's actions resulted in a categorical taking of their property under *Lucas* and *First English*, petitioners never contended that TRPA's actions resulted in a taking under *Penn Central*. Petitioners claimed in their trial briefing that the balancing test articulated in *Penn Central* did not apply to this case and they therefore affirmatively declined to address the *Penn Central* factors. Plaintiffs' Trial Br. at 13-14.

In contrast, TRPA specifically argued that *Penn Central* was controlling, and that under that analysis no taking had occurred. Defendants' Trial Br. at 38-45. TRPA produced extensive factual evidence concerning the factors relevant under *Penn Central*, including expert testimony demonstrating that properties affected by TRPA's moratorium retained economic value during the pendency of the moratorium (*see, e.g.*, J.A. 131-134), extensive (and unchallenged) evidence concerning the harm to the Lake that would occur without limits on the spiraling race to develop pending adoption of a regional plan (Pet. App. 28 n.15, 81-82, 89), and evidence demonstrating that petitioners did not have a reasonable, investment-backed expectation that they would be able to develop their properties during the 32-month period the moratorium was in effect. *Id.* at 88-89.

After due consideration of this evidence, the district court found that TRPA's actions did not result in a taking under *Penn Central.* In reaching this conclusion, the court specifically considered and made findings with respect to each of the *Penn Central* factors. *Id.* at 88-93.

2. On appeal, TRPA challenged the district court's ruling that its moratorium resulted in a *per se* taking under *Lucas,* but petitioners chose not to challenge the lower court's adverse *Penn Central* ruling. The court of appeals expressly acknowledged petitioners' failure to appeal the district court's ruling under *Penn Central*: plaintiffs "stated explicitly on this appeal that they do not argue that the regulations constitute a taking under the ad hoc balancing approach described in *Penn Central.*" Pet. App. 19. Relying on petitioners' express disclaimer, the appellate court focused primarily on the sole issue on appeal—the district court's determination that TRPA's actions resulted in a *per se* taking. *See id.* at 3 ("The principal question on this appeal is whether a temporary planning moratorium, enacted by TRPA to halt development while a new regional land-use plan was being devised, effected a taking of each plaintiff's property

under the standard set forth in *Lucas*"). Although the court of appeals did not conduct an extensive analysis of the *Penn Central* factors—the issue was not pertinent given petitioners' tactical litigating decision—it did find that the district court's conclusions in this regard were clearly correct. *Id.* at 40.

3. Petitioners' failure to address *Penn Central* at trial and on appeal carried through to its petition for certiorari, which did not even cite the decision. Likewise, petitioners' opening brief before this Court cites *Penn Central* only once in passing (Pet. Br. 36) and—consistent with their decision not to present a *Penn Central* claim—does not attempt to address the applicability of the *Penn Central* balancing test to temporary development moratoria. The question whether the particular moratorium at issue in this case gives rise to a taking under *Penn Central* is therefore not before the Court. *See NYNEX Corp.* v. *Discon, Inc.*, 525 U.S. 128, 140 (1998) (declining to consider antitrust claim under rule of reason based on particular facts when questions presented "were limited to the application of the *per se* rule"). Also not before the Court is petitioners' hastily-cobbled "substantial adverse impact" test (Pet. Br. 47-49), a variant of the *Penn Central* test raised for the first time in petitioners' opening brief before this Court.

This Court's practice is to "deal with the case as it came here and affirm or reverse based on the ground relied on below." *Peralta* v. *Heights Med. Ctr., Inc.*, 485 U.S. 80, 86 (1988). *See Heller* v. *Doe*, 509 U.S. 312, 319 (1993) (Court should "decide this case as it has been presented to the courts whose judgments are being reviewed"). All that is before this Court, and all that was before the courts below, is petitioners' facial claim of a categorical taking. Because the mere enactment by TRPA of its temporary moratorium was not a *per se* taking, the judgment of the court of appeals should be affirmed.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

JOHN G. ROBERTS, JR.
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

E. CLEMENT SHUTE, JR.*
FRAN M. LAYTON
ELLISON FOLK
SHUTE, MIHALY
& WEINBERGER LLP
396 Hayes Street
San Francisco, CA 94102
(415) 552-7272

*Counsel of Record

JOHN L. MARSHALL
TAHOE REGIONAL PLANNING
AGENCY
P.O. Box 1038
Zephyr Cove, NV 89448
(775) 588-4547

RICHARD J. LAZARUS
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9129

Counsel for Respondent
Tahoe Regional Planning
Agency

Additional counsel:

FRANKIE SUE DEL PAPA
Attorney General
WILLIAM J. FREY
Deputy Attorney General
OFFICE OF THE NEVADA
ATTORNEY GENERAL
100 North Carson Street
Carson City, NV 89701
(775) 687-6532

Counsel for Respondent
State of Nevada

BILL LOCKYER
Attorney General
RICHARD M. FRANK
Chief Assistant Attorney
General
MATTHEW RODRIQUEZ
Senior Assistant Attorney
General
DANIEL L. SIEGEL
Supervising Deputy
Attorney General
CALIFORNIA DEPARTMENT
OF JUSTICE
1300 I Street
P.O. Box 944255
Sacramento, CA 94244
(916) 323-9259

Counsel for Respondent
State of California

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In The

Supreme Court of the United States

TAHOE SIERRA PRESERVATION COUNCIL, INC.,
a California non-profit corporation
and membership organization, *et al.*,

Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY,
a separate legal entity created pursuant
to Bi-State Compact, *et al.*,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

REPLY BRIEF

MICHAEL M. BERGER*
GIDEON KANNER
BERGER & NORTON
A LAW CORPORATION
1620 26th Street
Suite 200 South
Santa Monica, CA 90404-4040
(310) 449-1000

LAWRENCE L. HOFFMAN
HOFFMAN LAW OFFICES
3000 No. Lake Boulevard
Post Office Box 7740
Tahoe City, CA 96145
(530) 583-8542

Counsel for Petitioners

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION

1. Twelve lawyers from six different law offices submitted the Tahoe Regional Planning Agency's (TRPA) brief, but they all missed the point of the Petitioners' (landowners) opening brief. They assert that "Petitioners *never explain* the legal underpinnings of their theory." (TRPA 15; emphasis added.) And, remaining true to that blindness, they never deal with the argument at pp. 32-49 of the opening brief – where those underpinnings are analyzed at length. In a nutshell, the landowners' legal theory is, as the headline on page 32 expressed it:

> **"FROM A LANDOWNER'S POINT OF VIEW, GOVERNMENT IMPOSITION OF A FREEZE ON ALL ECONOMICALLY PRODUCTIVE USES, ALBEIT TEMPORARILY, IS THE EQUIVALENT OF A TEMPORARY CONDEMNATION OF SUCH LAND. IN EITHER EVENT, THE RIGHTFUL OWNER'S *USE* OF THE LAND HAS BEEN TAKEN, AND JUST COMPENSATION IS DUE."**

Not one of TRPA's half dozen amici takes issue with this underlying thesis either. In fact, only one of them even mentions it, and its analysis supports the landowners, not TRPA. The brief filed by the National Audubon Society and three other environmental organizations put it this way:

> "As the Court made crystal clear in *First English*, regulatory takings doctrine flows from and is governed by the same basic principles which govern exercises of the power of eminent domain generally. *See* 482 U.S. at 314. When the government seizes property by eminent domain, say for a road, it cannot be argued that the government has no obligation to pay compensation because the road addresses a 'serious' or 'important' public transportation problem. Similarly, in the regulatory takings context, it would make no sense to conclude that the importance of the police power objective being pursued should weigh against a finding of a compensable taking." (Audubon 21-22.)

The Audubon Society's brief not only bolsters the landowners' legal theory, it lays to rest the arguments made by TRPA and the rest of its amici that moratoria in general, and this series of moratoria in particular, should not require compensation because they are imposed to achieve praiseworthy goals.

2. One other matter bears early mention. TRPA and its amici take the landowners to task for having the effrontery to note that the 1984 and 1987 TRPA Plans also precluded all use of these lots. But that's the fact. The trial judge found that, once the "temporary" moratoria were replaced by the 1984 Plan, "nothing much changed" for these landowners. (Pet. App., pp. 75-76.)

This Court does not sit to decide hypothetical questions. Thus, although it framed the question now being briefed as whether the Ninth Circuit erred in its conclusions about temporary takings, that question must be addressed on this record, not in a vacuum. (See *United States v. Dickinson*, 331 U.S. 745, 748 [1947] ["Constitution is intended to preserve practical and substantial rights, not to maintain theories. . . . "].)[1] Reality is this: these landowners waited during the entirety of the "temporary" moratorium period before filing suit. They did not immediately rush to court, but did so only after the "temporary" moratoria were replaced with a permanent plan in which "nothing much changed" for them, and the use of their land remained frozen.

Thus, TRPA's and its friends' generalizations about how temporary moratoria end, and how thereupon there is use at the end of the tunnel, do not deal with this case. The end of *these* moratoria made the land's disutility as permanent as the regulation in *Lucas v. South Carolina*

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[1] TRPA and its amici demand that this Court ignore the *fact* that the end of the moratoria brought only continued non-use, so they can defend the hypothetical *theory* that all moratoria eventually end and provide viable use (TRPA, pp. 26, 34-35; Audubon, pp. 1, 6, 18-19; APA, p. 28; SG, pp. 18-19) – even though this one did neither.

Coastal Council, 505 U.S. 1003 (1992). In short, Lake Tahoe is being protected on the backs of Petitioners, contrary to *Armstrong v. United States*, 364 U.S. 40, 49 (1960), which held that the cost of public benefits must be apportioned among those who benefit from them, and not simply dumped onto those few citizens who fortuitously find themselves in the path of grandiose government plans intended to benefit society at large.

I A MORATORIUM – AS EXEMPLIFIED HERE – IS A REGULATION THAT TOTALLY FREEZES THE ABILITY OF A LANDOWNER TO MAKE ANY ECONOMICALLY PRODUCTIVE USE OF LAND. THAT KIND OF REGULATION IS A *PER SE* TAKING THAT REQUIRES COMPENSATION.

Neither TRPA nor its amici want to defend the total freeze on property use effected by TRPA's moratoria.[2] Small wonder. Whenever commentators or lower courts have defended regulations that call themselves "moratoria," they focus on the uses remaining to the owners during the moratorium or the uses available thereafter.[3] They do so because even pro-government advocates know the importance – if moratoria are to be defensible – of *not* prohibiting *all* use, thereby leaving landowners something to do other than mark off days on a calendar. (E.g., Robert Meltz, Dwight H. Merriam & Richard M.

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[2] The amicus brief filed by 22 States, for example, demands that "[t]he issue cannot be limited to the context of the Tahoe Basin and the restrictions placed on petitioners' property" (States, p. 2), and then presents generalized arguments unrelated to this case. The American Planning Association takes a different tack, insisting that there *were* uses permitted. (APA, p. 28 ["there were a range of uses available."] None are mentioned, and no record is either cited or available to support that assertion.)

[3] See, e.g., *Sederquist v. City of Tiburon*, 765 F.2d 756, 758 (9th Cir. 1984), noting the moratorium in issue there provided for "use permits."

Frank, The Takings Issue 278 [1999] [ironically, one of the book's authors represents Respondent State of California herein].)

Here, however, *the facts preclude those arguments because there is no permitted use*. Nonetheless, TRPA and its amici base their position on the unmitigated fiction that the moratoria left Petitioners with some use of their land either during (APA, pp. 5, 28; Govt. Associations, pp. 17, 19) or after (TRPA, p. 26; Audubon, pp. 1, 6, 18-19, 27; APA, p. 28; SG, pp. 18-19; Govt. Associations, p. 17) the moratoria, or – incredibly – that these landowners actually *benefited* from the moratoria (TRPA, p. 26; SG, p. 29; States, p. 21).[4]

Thus, it seems necessary to examine the "moratorium" that is before this Court. This moratorium was a total freeze on the ability of the owners of the affected land to develop their land in any way. Moreover, when the moratorium supposedly ended, the affected owners were *still* forbidden to use their land. (Pet. App., pp. 75-76 [per trial judge: "nothing much changed"].) That is *not* the mere "adjust[ment of] the benefits and burdens of economic life" this Court talked about in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). That kind of moratorium has been recognized as being a *Lucas* taking requiring compensation:

> "A moratorium should be considered a categorical taking under *Lucas* when it prohibits all development or the submission of development applications on a given parcel of property that currently has available no economically beneficial or productive uses." (Wendy U. Larsen & Marcella Larsen, *Moratoria as Takings Under*

[4] By contrast, Judge Kozinski's dissent from the *en banc* vote below (for himself and four others) recognizes the reality of the two decade freeze. (Pet. App., pp. 158, 159, 163.) See also Steven J. Eagle, *Development Moratoria*, First English *Principles, and Regulatory Takings*, 31 Env. L. Rptr. 11232, 11237, 11238 (2001).

> Lucas, 46 Land Use Law & Zoning Dig., no. 6, p. 3 at 6 [1994].)
>
> "[I]n the residential context, a moratorium should be considered a categorical taking where property zoned residential has no existing habitable/saleable structures and is vacant." (Michael A. Zizka, et al., State & Local Government Land Use Liability § 4:4, p. 4-11 [rev. 2000].)
>
> "The Supreme Court's *Lucas* decision requires a holding that a per se taking has occurred when a moratorium denies a landowner all reasonable use of his land. . . . " (Daniel R. Mandelker, Jules B. Gerard & E. Thomas Sullivan, Federal Land Use Law § 2A.05[2][c], p. 2A-65 [rev. 2001].)

What is before this Court is a categorical moratorium that permits *no* productive private use during its entire existence. *That* is the factual predicate of this case. And *that* is the context in which the law needs to be analyzed. (See *Cohens v. Virginia*, 6 Wheat. [17 U.S.] 264, 399-400 [1821].)

Thus, the class of cases covered by the *per se* rule proposed by the landowners includes – like *Lucas* – those categorical moratoria that wholly preclude private economically productive use of privately owned land. If the Court were also to conclude that *other* kinds of moratoria (e.g., the kind that TRPA and its amici have chosen to defend, i.e., those that do *not* wholly preclude productive use) are subject to an *ad hoc* analysis under *Penn Central*,[5] that would not hinder reversal of the Ninth Circuit *on these facts*, nor preclude application of a *per se* rule when they recur.

[5] Intriguingly, TRPA's environmental amici seem to believe the *Penn Central* rule is not worth the paper it's written on. (Audubon, pp. 19-20, 23.)

II THE GOVERNMENT CANNOT TAKE THE RIGHT TO USE LAND – NEITHER THE EQUIVALENT OF A FEE INTEREST NOR A LEASEHOLD – WITHOUT COMPENSATION.

The salient feature of the common law is its ability to grow and adapt. Regulatory takings law is a particularly noteworthy illustration, because its modern history dates back only about two decades. When this Court re-entered the field after the nearly half-century pause that followed *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), it was properly cautious. But that does not mean that the first cases that came along locked the law in some rigid straightjacket. In its first effort, *Penn Central*, the Court was content to say that it had no hard and fast rules, and it would examine each takings case on its own facts. (438 U.S. at 124.)

The law continued to develop.[6] A few years later, the Court decided *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). By that time, the Court was ready to articulate the holding that a permanent physical invasion does not require *ad hoc* examination, and is a *per se* taking.[7] And then came *Lucas*, where the Court announced another *per se* taking event: a regulation that denied landowners the economically productive or beneficial use of their land. That didn't require *ad hoc* examination either.

TRPA believes the law then stopped developing; that when this Court said that those two types of government

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[6] From 1980 through 1987, for example, th Court devoted substantial resources to the question of whether the remedy for a regulatory taking was compensation or invalidation. (See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 305, 311 [1987].)

[7] While *Loretto* distinguished between physical and regulatory impacts on property, *First English* concluded (after the Court had five more years' experience with regulatory takings) that the two were legally the same. (482 U.S. at 318.)

action represented *per se*, or categorical, takings, that completed the list and closed the file. (See TRPA, pp. 15, 20.) TRPA is wrong.[8]

With respect, those who would make such arguments are what California's late Chief Justice Roger Traynor called "bogus defenders of stare decisis," bent on hiding behind their view of where the law stopped in order to prevent their opponents from obtaining justice. (Roger J. Traynor, *No Magic Words Could Do It Justice*, 49 Cal. L. Rev. 615, 621 [1961].)

A The Fundamental Rules of Regulatory Takings – the Same as Those in Direct Condemnations – Stem From the Fifth Amendment's Just Compensation Clause.

The rule the landowners seek here is only a modest application of concepts already announced, i.e., that a regulation totally forbidding all use of property for any period of time is another kind of *per se* taking. As discussed in the landowners' opening brief (and never disputed by TRPA), there is no legal, conceptual, or jurisprudential difference between a government agency's deliberate decision to freeze the use of land for a period of years and that same agency's formal condemnation of the right of user for the same time period. In the latter situation, no one would doubt the owner's right to compensation. The same should hold true here. This Court concluded plainly in *Lucas* that restraints imposed

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[8] In *Babbitt v. Youpee*, 519 U.S. 234 (1997), this Court considered adding another *per se* taking to the list: abrogation of the right to devise property. That proved unnecessary, however, because Congress clearly had failed to resolve the problems noted in *Hodel v. Irving*, 481 U.S. 704 (1987), in which the Court had struck down an earlier statute on the same subject. (519 U.S. at 243, fn. 3.) If this Court agreed with TRPA that the list of *per se* takings was closed, it could have said simply that there cannot be any additional *per se* takings. But it did not.

by regulation are constitutionally the same as those imposed through condemnation:

> "The many statutes on the books, both state and federal, that provide for the use of eminent domain to impose servitudes on private scenic lands preventing developmental uses, or to acquire such lands altogether, suggest *the practical equivalence* in this setting *of negative regulation and appropriation*. [Citing numerous statutes.]" (505 U.S. at 1018-1019; emphasis added.)

When regulations have the same effect as physical occupation (i.e., assuming control and precluding the landowners from using their own land),[9] there is no functional difference between the two modes of government action. (*First English*, 482 U.S. at 318-319; *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 652 [1981] [Brennan, J., dissenting].) Either way, the owners are deprived of the use and enjoyment of their land, and it is that deprivation, not the formal acquisition of title by the government, that accomplishes the taking. (*U.S. v. General Motors*, 323 U.S. 373, 378 [1945]; *Kirby Forest Indus., Inc. v. U.S.*, 467 U.S. 1, 14 [1984]; see also *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 244 [1984].)[10]

In *General Motors*, this Court addressed the compensation due when the government took temporary occupancy of property. Carefully parsing the words of the Fifth Amendment, the Court concluded first that "property" included all interests in land an individual might hold, and then decided that determining what has been "taken" is based on "the deprivation of the former owner

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[9] See *Hendler v. United States*, 952 F.2d 1364, 1374 (Fed. Cir. 1991) ("The Government does not have the right to declare itself a co-tenant-in-possession with a property owner.")

[10] This kind of delay is unrelated to the delay suffered in *Agins* while the city studied condemning the property. (See APA, p. 15.) Absent a direct legal restraint, potential condemnees are free to use their land as they see fit. (*Kirby*, 467 U.S. at 15.) Not so, the targets of a moratorium.

rather than the accretion of a right or interest to the sovereign. . . . " (323 U.S. at 378.) There, what was taken was an estate for years, i.e., a temporary deprivation of the right of use. The same is true at bench – but without the agency honestly fessing up to it. (See also *United States v. Petty Motor Co.*, 327 U.S. 372, 378 [1946] [constitutionally immaterial whether government took leasehold, or right to use "or only destroyed the tenant's right of occupancy"].)

In *Kirby*, which dealt with the government's delay in completing an acquisition, the Court concluded simply that:

> "We have frequently recognized that a radical curtailment of a landowner's freedom to make use of or ability to derive income from his land may give rise to a taking within the meaning of the Fifth Amendment, even if the Government has not physically intruded upon the premises or acquired a legal interest in the property." (467 U.S. at 14; Marshall, J., for a unanimous Court.)

"[R]adical curtailment of a landowner's freedom to make use of . . . his land" seems a stunningly apt description of what TRPA did here. When government enacts regulations so severe that they prevent all economically productive private use of privately owned land, the government has taken an interest in the land as surely as if it directly condemned it. Fifth Amendment compensation follows. As this Court put it in *First English*, "government action that works a taking of property rights *necessarily* implicates the 'constitutional obligation to pay just compensation.' [Citation.]" (482 U.S. at 315; emphasis added.)

B Courts Have Always Protected the Right of User.

This Court has repeatedly framed its test for a regulatory taking in terms of the ability of landowners to *use* their land.[11]

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[11] *Penn Central*, 438 U.S. at 124; *Kaiser Aetna v. United States*, 444 U.S. 164, 174 n. 8 (1979); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *San Diego Gas*, 450 U.S. at 653 (1981) (Brennan, J.,

Lucas was most decisive in focusing on denial of use as the key to a regulatory taking.[12] There, the Court repeatedly stressed its concern with the impact of South Carolina's regulation on Mr. Lucas' ability to make rational use of his vacant, but subdivided, land.[13] In its most recent decision, *Palazzolo v. Rhode Island*, 533 U.S. ___, 150 L.Ed.2d 592, 607 (2001), the Court reiterated this *Lucas* conclusion, as it assumed the owner could have built a substantial home on his land.

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dissenting); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981); *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 296 (1981); *Kirby*, 467 U.S. at 14; *United States v. Riverside Bayview Homes*, 474 U.S. 121, 126 (1985); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 485 (1987); *Nollan v. California Coastal Commn.*, 483 U.S. 825 (1987); *Lucas*, 505 U.S. at 1015; *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); *Suitum v. Tahoe Reg. Plan. Agency*, 520 U.S. 725, 736, fn. 10 (1997); *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 700 (1999); *Palazzolo v. Rhode Island*, 533 U.S. ___, 150 L.Ed.2d 592, 607 (2001).

[12] To be sure, references to deprivation of value can also be found in the opinion. That is understandable in light of the fact that the state trial court had found that the regulation deprived Mr. Lucas of all his land's value (a finding that seemed to engender substantial skepticism [see 505 U.S. at 1033-1034 (Kennedy, J., concurring)]). But the Court's emphasis plainly was on the loss of use, which was determinative.

[13] *Lucas*, 505 U.S. at 1016 ["economically viable use"]; 1016, fn. 6 ["economically viable use"; "economically beneficial use"]; 1016, fn. 7 ["economically feasible use"; "economically beneficial use"]; 1017 ["beneficial use"; "productive or economically beneficial use"]; 1018 ["economically beneficial uses"; "economically beneficial or productive options for its use"]; 1019 ["developmental uses"; "economically beneficial uses"; "economically idle"]; 1019, fn. 8 ["economically beneficial use"; "productive use"]; 1027 ["economically beneficial use"]; 1028 ["economically valuable use"]; 1029 ["economically beneficial use"]; 1030 ["economically productive or beneficial uses"].

The relationship of use to value was part of the recent *Del Monte Dunes* litigation. There, after the city had repeatedly turned down development applications and the owner had sued for compensation, the state bought the property for less than the testimony of its fair market value, but more than the owner had paid for it earlier. The jury nonetheless returned a verdict in the owner's favor, the Court of Appeals affirmed (*Del Monte Dunes v. City of Monterey*, 95 F.3d 1422, 1433 [9th Cir. 1996]), and this Court affirmed as well (526 U.S. 687). Moreover, the Court of Appeals discussed the question of remaining value in terms of a moratorium, in words that presaged the facts here:

> "For example, in conjunction with a legislative moratorium on property development, a state might implement a 'buy-out' program for environmentally sensitive property and purchase a landowner's property at a higher price than what the landowner originally paid. [Citations to *Lucas* and an earlier TRPA case.] A government buy-out, of course would not necessarily shield the government from the Takings Clause. Rather, the buy-out would likely implicate the issue of just compensation. Thus, a landowner who believed that the government bought out his property at an unfairly low price might choose to bring an action for just compensation." (95 F.3d at 1432.)

The idea that use is a key right in the property rights bundle is not restricted to takings law. As this Court concluded in a tax case:

> "We have little difficulty accepting the theory that *the use of valuable property . . . is itself a legally protectible property interest*. Of the aggregate rights associated with any property interest, the right of use of property is perhaps of the highest order." (*Dickman v. Commissioner*, 465 U.S. 330, 336 [1984]; emphasis added.)

C Whether the Taking is Temporary or Permanent is Constitutionally Irrelevant; It Only Goes to the Quantum of Compensation Payable Under the Just Compensation Clause.

In *First English*, this Court plainly acknowledged the concept of a temporary taking and the constitutional necessity to compensate when one occurs. (482 U.S. at 318.) It appears that TRPA and its friends are upset that the context of *First English* was a temporary planning moratorium of about the same length as the pre-1984 moratoria here. To evade that nasty factual coincidence, two of TRPA's amici insist that the facts of *First English* are "entirely irrelevant" to its holding. (States, p. 25; APA, p. 18, fn. 6.) Can't be so. Holdings are always tied to their facts, and if the Court believed the facts – as a matter of law – *could not* support a taking, it would have refused to decide the issue, as it had previously. (See *First English*, 482 U.S. at 311.)

Moreover, in *Lucas*, the government argued that its regulation had been amended so that Mr. Lucas could apply for a permit, rendering any consideration of a taking premature. This Court would have none of it, concluding that the question of whether the amendment had rendered the taking temporary could be decided by the state courts on remand. (505 U.S. at 1011-1012 [citing *First English*].)[14] In his concurring opinion, Justice Kennedy also noted that this only presented a question for remand, saying "it is well established that temporary takings are as protected by the Constitution as are permanent ones. [Citing *First English*.]" (505 U.S. at 1033.)

TRPA also asserts that economically viable use cannot mean "immediate" use. (TRPA, pp. 16, 31.) Sometimes, it does. Although landowners may have to wait a modest amount of time while development applications

[14] On remand, the South Carolina Supreme Court found a temporary taking as a matter of law. (*Lucas v. South Carolina Coastal Council*, 424 S.E.2d 484 [S.C. 1992].)

are being processed (not frozen, but processed),[15] a deliberate government development ban is a far different creature. For example, in *Lomarch Corp. v. Mayor of Englewood*, 237 A.2d 881 (N.J. 1968), the court held that if government wanted to freeze the use of land for one year while deciding whether to acquire it, it had to compensate the owner for seizing his ability to use the land, equating the action with the purchase of an option on the private market. Similarly, in *Seawall Associates v. City of New York*, 544 N.Y.S.2d 542 (N.Y. 1989), the court held that a five year moratorium on converting low rent housing into anything else was a taking. The court found the ordinance facially invalid as a drastic interference with the owners' "*right to use* their properties as they see fit" (544 N.Y.S.2d at 549; emphasis, the Court's) and a taking of their right to develop their properties (544 N.Y.S.2d at 550).[16] In *Nolan v. Newtown Township*, 49 Pa. D. & C. 4th 148 (2000), a landowner sued when the township instituted an 18 month moratorium on subdivisions while it contemplated changes in its ordinance. The court held that he properly stated a claim under *First English* and set the matter for valuation. Those cases involved taking the "immediate" right to use.

Because of the shared constitutional parentage of direct and inverse condemnation law,[17] *First English* analogized the temporary moratorium before it to the condemnation of a

[15] Most states have enacted statutes concluding that 30 to 60 days is adequate time to process such applications. (See Steven J. Eagle, *Development Moratoria*, First English *Principles, and Regulatory Takings*, 31 Env. L. Rptr. 11232, 11236 [2001].)

[16] See also *Keystone Assocs. v. Moerdler*, 278 N.Y.S.2d 185 (N.Y. 1967) (invalidating an uncompensated 180-day delay on the right of the purchasers of the old Metropolitan Opera House to demolish and redevelop the property).

[17] See *Palazzolo*, 150 L.Ed.2d at, 618, fn. * (O'Connor, J., concurring), noting that regulatory takings involve two questions: (1) whether the regulation is valid under the police power, and (2) whether that police power exercise requires compensation.

leasehold for the same period of time. Even if the owner had no "immediate" plan for use, compensation would still be due.[18] Thus, the key to all takings is the deprivation of the owner's property rights. (See Eagle, op. cit., p. 11238.) The length of the deprivation affects only the quantum of compensation.

Similarly, TRPA's (and the Ninth Circuit's) position that temporary takings – by definition – cannot arise from regulations that were intended to be temporary, makes no sense.[19] If, as this Court has repeatedly held, the Constitution is concerned with the pragmatic impact of government action on citizens, then the mode of infliction is not determinative. If the action is severe enough to be a taking, then it remains a taking even if intended only for a finite period of time. Besides, the rule advocated by TRPA would open the door to abuses – for who is to say that an ostensibly temporary moratorium is not actually a substitute for a use prohibition? Or that a rolling series of "temporary" moratoria are not merely a surrogate for a permanent development ban? (See Eagle, op. cit., p. 11237-11238; Pet. App., pp. 163-164 [Kozinski, J., dissenting].)

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[18] It is bedrock condemnation law that the owner's personal plans are irrelevant. That the *valuation* in condemnation is related to the property's highest and best use (even if that is in the future) (see Govt. Associations, pp. 17-19) is irrelevant here, as it is a different issue. Regulatory takings are concerned with the impact of regulations today, as a threshold liability factor. Once past a liability finding, valuation would be as it always is in eminent domain. But the two issues should not be confused.

[19] The fact that a professor shares that view (see APA, p. 15) merely shows that even bright people can misread cases. For a contrary professorial view, see Bruce M. Kramer, *Recent Developments in Land Use and Environmental Law: Revolution or Evolution?* 1988 Institute on Planning, Zoning, and Eminent Domain, ch. 5, p. 5-5 ("intentionally or accidentally temporary in nature").

The Solicitor General parts company with TRPA and posits that there "could be circumstances in which even land-use regulation that was intended from the outset to be temporary should be analyzed under the *Lucas* per se takings approach. . . . " (SG, p. 28.) To find such circumstances, the brief insists that:

> "the regulation precluded all economically viable use of property during the period it was in effect *and* also shared the other characteristics of the regulation that was found in *Lucas* to be a per se taking – *i.e.*, if the regulation imposed markedly disproportionate burdens on isolated landowners rather than securing a reciprocity of advantage to a broad community, effectively pressed private property into public service (albeit for a finite period), and represented a significant departure from background property-law principles." (SG, p. 28.)

If that is to be the test, this case meets each part. First, although these moratoria adversely affected a substantial number of properties, they placed a disproportionate burden on relatively few because the area under TRPA's regulation covers some *500 square miles, with thousands upon thousands of subdivided lots*. The affected property owners are only those in the so-called "high hazard" areas on the steeper hillsides or in the stream environment zones. All the vacant lots in that targeted area – and only those – were frozen by the moratoria. Second, those targeted individuals received *no* "reciprocity of advantage" – indeed, no advantage of any kind – from either the moratoria or the permanent regulations that followed. Their lots were frozen in 1981 and remain so. That *others* in the Tahoe Basin benefit from the Petitioners' sacrifice only underscores the disproportionality of the Petitioners' loss. Third, all of these properties were pressed into public service, i.e., complete non-use, because that is the "service" TRPA demanded.[20] Fourth, the proof of

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[20] Please recall that the trial court found the regulations were written in such draconian terms that some of these landowners could not even set foot *on their own land* (because

the impact of these moratoria is in the permanent regulations that replaced them. In light of TRPA's mission to stop the eutrophication of the lake, along with the known science that made it a foregone conclusion that stopping development on these lands in perpetuity was the only solution (see, e.g., the amicus brief filed here by a group of scientists), the moratorium *did* reflect a final determination about the non-use of these lots. It merely held them in limbo until formal studies could be completed justifying a permanent development ban. And the permanent regulations that followed (which, as the trial court found, made no change in what the Petitioners could do [Pet. App., pp. 75-76]) proved that. Finally, no "background" legal precept holds that the property of a selected group of individuals (even a fairly large group) can be singled out for a *de facto* taking to benefit a larger group.

These landowners were subjected to unconstitutional regulation, and their lands were *per se* taken, even under the Solicitor General's proposed criteria.

III TRPA'S VIRTUOUS PURPOSE CANNOT JUSTIFY CONFISCATING THE USE OF PRIVATE PROPERTY WITHOUT COMPENSATION.

TRPA and most of its amici spend an inordinate amount of time crashing through a door that was never locked, when they argue that Lake Tahoe is beautiful and worth preserving, and therefore it is necessary to restrict development in the Tahoe Basin.[21] Indeed, the amicus

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that would disturb the site) *unless they obtained a permit from TRPA*. (Pet. App., p. 73.)

[21] Stressing environmental factors has become a favored tactic of pro-regulation advocates these days. See, e.g., Richard J. Lazarus, *Litigating Suitum v. Tahoe Reg'l Planning Agency in the United States Supreme Court*, 12 J. Land Use & Env'tl Law 179 (1997), in which counsel for TRPA in *Suitum v. Tahoe Reg. Plan. Agency*, 520 U.S. 725 (1997) (and one of its counsel in this case, as well) describes the way he tried to spin the analysis away from

brief by a group of scientists is wholly devoted to that point. Petitioners do not dispute it. (See, e.g., Cert. Pet., pp. 6-7; Pet. Br., p. 3.) It's all irrelevant.

This case is about *means* not *ends*. What is at issue is *not* whether TRPA can protect the glory of Lake Tahoe, but whether it can do so by freezing the use of Petitioners' land without compensation.[22] As the Supreme Judicial Court of Massachusetts aptly observed:

> "In this conflict between the ecological and the constitutional, it is plain that neither is to be consumed by the other. It is the duty of the Department of Conservation to look after the interests of the former, and it is the duty of the courts to stand guard over constitutional rights." (*Commissioner of Natural Resources v. S. Volpe & Co., Inc.*, 206 N.E.2d 666, 671 [Mass. 1964].)[23]

TRPA and its amici believe (as did the Ninth Circuit) that TRPA's goals were praiseworthy. TRPA can surely take credit for halting development in those areas of the Tahoe Basin it deemed hazardous to the Lake's purity. The constitutional problem is that it did so at the expense

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the constitutional issues at its heart and toward paeans to the beauty of Lake Tahoe.

[22] Thus, comments like the following, from the Council of State Governments and seven similar organizations, are singularly off target: "Without the protections challenged in this case, the Lake would turn green . . . and land values in the region would plummet." (Govt. Associations, p. 16, fn. 11.) No "protections" are "challenged" in this case. The landowners seek compensation, not invalidation of "protections."

[23] Some eight decades ago, in *Pennsylvania Coal*, the dissenting opinion argued the contrary position that a "restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking." (260 U.S. at 417.) Eight Justices rejected that proposition. The Court has consistently rejected that proposition ever since. (See cases discussed at Pet. Br., pp. 39-44.)

of a targeted group of individuals who weren't doing anything improper with their land. In fact, all they ever wanted to do with it was to use it in the very way for which the land had been officially planned and zoned for many years (as many of their neighbors had done): personal, single-family homes on lots that had already been lawfully subdivided for that purpose.[24] The protection of what TRPA calls "the crown jewel of the Sierra Nevada mountain range" (TRPA, p. 4) is not the responsibility of individuals. The Crown protects the crown jewels.[25] In the words of the Texas Supreme Court, there is no rule holding " . . . that government may take or hold another's property without paying for it, just because the land is pretty." (*City of Austin v. Teague*, 570 S.W.2d 389, 394 [Tex. 1978].)

Thus, when the federal government decided to protect the ancient Coast Redwoods, another irreplaceable environmental treasure, it bought them. (Pub. L. 90-454, 82 Stat. 931 [1968].) And so it should here.

IV THE SKY WILL NOT FALL IF LANDOWNERS ARE COMPENSATED.

The briefs filed in support of the Ninth Circuit's ruling raise familiar "Chicken Little" arguments, of the

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[24] It cannot go without at least a brief mention that constructing housing is deemed a highly favored activity that is encouraged by a host of government policies, subsidies, and tax advantages. There is thus simply nothing wrong with Petitioners' desire to build individual homes on their land explicitly zoned for that purpose. (The fact that their neighbors were not ordered to demolish their homes shows there was nothing inherently wrong with Petitioners' plans. [See *Lucas*, 505 U.S. at 1031.])

[25] The law obliges the government to purchase the property it requires to further the public interest and not compel its owners to have to sue for compensation. (42 U.S.C. § 4651[8].) California and Nevada adopted similar laws patterned after the federal statute. (Cal. Govt. Code § 7267.6; NRS 342.045.)

"parade of horribles" variety. (E.g., Audubon, p. 2; Govt. Associations, p. 3; States, p. 1.) Their alarums are unfounded.[26] The real problem is that, relying on undue judicial deference to their handiwork, many land use regulators have grown lax and lazy about keeping their plans up to date, and have lapsed into the unfortunate practice of using *ad hoc* moratoria as substitutes for municipal foresight and responsible planning. As two lawyer/land use consultants put it in an American Planning Association publication, "moratoria should not be used as a crutch in place of long-term planning. . . . " (Wendy U. Larsen & Marcella Larsen, *Moratoria as Takings Under* Lucas, 46 Land Use Law & Zoning Digest, no. 6, p. 3 [1994].) Building on that thought, a more recent text concluded:

> "moratoria are not an acceptable substitute for consistent advance long-term planning. Moratoria are enacted, in most cases, because comprehensive plans and land development regulations have not been prepared or kept current with changing conditions. If they were, development applications which are unwanted and the kind of 'emergency' planning studies which engender moratoria would be avoided." (Michael A. Zizka, et al., State & Local Government Land Use Liability § 4:4, p. 4-14 [rev. 2000].)

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[26] The tactic is becoming hackneyed. The Court's own files in *First English*, for example, enshrine a variety of such arguments. There, a large group of state amici said the church was seeking a "radical reformulation of takings jurisprudence" that would "cripple" regulators (pp.1-2), risk "financial chaos," and have "a major chilling effect on the regulatory process" (p. 23). The State and Local Legal Center predicted that a ruling adverse to the government would "paralyze" public health and safety regulation, "threatening bankruptcy" for municipalities. (p.3.) However, when this Court ruled against the government, life continued, and there have been no reports of municipal paralysis or bankruptcy related to the opinion.

As for the financial catastrophe that TRPA and its amici predict, the Larsens' article concludes that if categorical moratoria (like the ones at bench) are invoked properly (i.e., rarely and for limited times and reasons), "the instances where the *Lucas* categorical taking rule would come into play with moratoria should be relatively rare. [¶] Moratoria will even more rarely cause takings when communities are careful *not* to use them as substitutes for consistent long-term planning." (Larsen & Larsen, *op. cit.*, 46 Land Use Law & Zoning Digest, no. 6, p. 7; emphasis in original.)[27]

CONCLUSION

TRPA sacrificed the rights of these landowners so that Lake Tahoe could remain clear and blue and beautiful. It is time for TRPA to shoulder the burden for that very public project by compensating them for what was taken.

Petitioners pray that the decision of the Ninth Circuit be reversed.

Respectfully submitted,

LAWRENCE L. HOFFMAN
HOFFMAN LAW OFFICES

MICHAEL M. BERGER*
GIDEON KANNER
BERGER & NORTON

Counsel for Petitioners
**Counsel of Record*

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[27] Unfortunately, the Solicitor General's brief does not add clarity on this point, possibly because the United States does not engage in land use regulation like state and local government agencies do and that office is less familiar with the process. That resulted in a brief that mistakenly seeks to minimize the use and impact of moratoria. Thus, while the Solicitor General believes that "no land-use agency is likely to employ moratoria on a routine basis" (SG, p. 19), that is simply not so. Others properly note that moratoria are used so often they have become a standard, albeit improper, tool in the governmental box (e.g., States, p. 2; Govt. Associations, pp. 1, 4, 7).

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No. 00-1167

In the Supreme Court of the United States

TAHOE-SIERRA PRESERVATION COUNCIL, INC., ET AL.,
PETITIONERS

v.

TAHOE REGIONAL PLANNING AGENCY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

THEODORE B. OLSON
Solicitor General
Counsel of Record

JOHN C. CRUDEN
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

MALCOLM L. STEWART
Assistant to the Solicitor General

PETER H. OPPENHEIMER
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the Takings Clause of the United States Constitution.

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In the Supreme Court of the United States

No. 00-1167

TAHOE-SIERRA PRESERVATION COUNCIL, INC., ET AL.,
PETITIONERS

v.

TAHOE REGIONAL PLANNING AGENCY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

Various acts of Congress provide for a federal agency to regulate the permissible uses of privately-owned real property, or for States to carry out such programs pursuant to federal standards. See, *e.g.*, Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*; Clean Air Act, 42 U.S.C. 7401 *et seq.*; Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.* The United States has a substantial interest in the proper application of the Fifth Amendment's Just Compensation Clause to those regulatory efforts. See, *e.g.*, *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126-129 (1985) (rejecting takings challenge to Corps of Engineers permitting program under CWA). In addition, respondent Tahoe Regional Planning Agency was created by an interstate compact between California and Nevada that was approved by Congress. Act of Dec. 18, 1969, Pub. L. No. 91-

148, 83 Stat. 360; see also Act of Dec. 19, 1980, Pub. L. No. 96-551, 94 Stat. 3233 (amendments strengthening compact); Lake Tahoe Restoration Act, Pub. L. No. 106-506, 114 Stat. 2351.

STATEMENT

1. The parcels of land at issue in this case are located in environmentally sensitive areas around Lake Tahoe, an alpine lake of unique clarity and color, attributable in part to the low levels of nutrients that have historically been present in the water. Pet. App. 4; see *id.* at 60-61. Since the 1950's, however, substantial development in the region has created impervious surfaces such as roads and houses that accelerate the flow of nutrients into Lake Tahoe. *Id.* at 5, 63. Rising nutrient levels stimulate the growth of algae, which diminishes the lake's clarity, alters its color, and jeopardizes fish and other lake-dwelling animal species. *Id.* at 4, 63.

In 1969, in an effort to halt the accelerating environmental damage to Lake Tahoe, Congress approved the bi-state Tahoe Regional Planning Compact. Pub. L. No. 91-148, 83 Stat. 360; see Pet. App. 6, 65. The 1969 Compact set goals for the protection and preservation of the lake and its surrounding basin and created respondent Tahoe Regional Planning Agency (TRPA) as the "single agency to coordinate and regulate development in the Basin and to conserve its natural resources." *Lake Country Estates* v. *Tahoe Reg'l Planning Agency*, 440 U.S. 391, 394 (1979); see Pet. App. 6, 65 As required by the 1969 Compact, respondent classified lands in the Lake Tahoe Basin according to their environmental sensitivity; those lands most prone to erosion, because they are either steeply sloped or located near streams or wetlands, were designated as "high hazard," while all other lands were denominated "low hazard." *Id.* at 6, 66-67.

In 1980, Congress approved amendments to the Compact after it "had proven inadequate for protection of the lake and its environment." *Suitum* v. *Tahoe Reg'l Planning Agency*,

520 U.S. 725, 729 (1997); see Pub. L. No. 96-551, 94 Stat. 3233; Pet. App. 6-7, 68. The 1980 Compact directed respondent, within 18 months and in consultation with the States of California and Nevada and various interested agencies, to adopt "environmental threshold carrying capacities" for the region, including standards for air and water quality, soil conservation, vegetation preservation, and noise. Compact Arts. II(i), V(b); *Suitum*, 520 U.S. at 729 n.1; Pet. App. 7 n.3. The Compact further directed respondent to amend its regional plan within 12 months after adoption of the carrying capacities in order to achieve and maintain those capacities and air and water quality standards. Compact Art. V(c). The Compact also stated that it was necessary in the meantime to "halt temporarily works of development in the region which might otherwise absorb the entire capability of the region for further development or direct it out of harmony with the ultimate plan." *Id.* Art. VI(c). The Compact therefore imposed a moratorium on certain large-scale development and capped the number of building permits that could be issued. See *ibid.*; see generally Pet. App. 7, 69-70. At the same time it was implementing the Compact's new requirements, respondent was also charged with adopting a regional water quality plan under Section 208 of the Clean Water Act, 33 U.S.C. 1288. See Pet. App. 68-69.

While working toward completion of the environmental threshold carrying capacities, respondent adopted Ordinance 81-5 (see Pet. App. 168-169), which took effect on August 24, 1981. *Id.* at 7, 70. Subject to certain exceptions, Ordinance 81-5 temporarily prohibited most residential and all commercial construction on high hazard lands until a new regional plan was completed. *Id.* at 70-74. As directed by the 1980 Compact, respondent adopted threshold carrying capacities on August 26, 1982, approximately two months after the expiration of the 18-month deadline set forth in the Compact. *Id.* at 8, 74. Respondent began work on the new regional plan but soon recognized that it would be unable to complete

the plan within the prescribed 12 months. *Id.* at 8, 74-75. Consequently, on August 26, 1983, respondent enacted Resolution 83-21 (see *id.* at 170-171), which suspended project reviews and approvals and the acceptance of new permit applications "pending adoption of the new regional plan." *Id.* at 170. Resolution 83-21 was continued in effect until the new plan was adopted on April 26, 1984, 32 months after respondent had initially suspended most development on high hazard lands. *Id.* at 8, 75.

2. On the day the 1984 regional plan was adopted, California filed suit to block its implementation, arguing that the plan's land-use controls were not sufficiently stringent to protect the Lake Tahoe Basin. Pet. App. 8, 76. Shortly thereafter, the District Court for the Eastern District of California blocked implementation of the new regional plan, first with a temporary restraining order and subsequently with a preliminary injunction. *Id.* at 8-9, 76-77. The preliminary injunction was affirmed on appeal, see *California ex rel. Van de Kamp* v. *Tahoe Regional Planning Agency*, 766 F.2d 1308 (9th Cir. 1985), and it remained in place until a revised regional plan was adopted in 1987. See Pet. App. 9, 77.

3. a. On June 25, 1984, petitioners filed parallel suits, which were subsequently consolidated in the District of Nevada, naming as defendants respondent TRPA, individual members of its governing board, and the States of California and Nevada. Pet. App. 9, 12, 77-78. Petitioners alleged violations of the Just Compensation, Due Process, Equal Protection, and Contracts Clauses, and they requested both monetary and equitable relief. *Id.* at 9, 78.

In the ensuing litigation, petitioners' claims were divided into four time periods: Period I (August 24, 1981, to August 26, 1983, when Ordinance 81-5 was in effect); Period II (August 27, 1983, to April 25, 1984, when Resolution 83-21 was in effect); Period III (April 26, 1984, to July 1, 1987, when the preliminary injunction against implementation of

the 1984 Plan was in effect); and Period IV (July 2, 1987, to the present, when the 1987 Plan has been in effect). Pet. App. 9-10. Most of the claims were dismissed on various grounds in a series of district court and court of appeals decisions. See generally *id.* at 79-81. However, the claims of some of the petitioners under 42 U.S.C. 1983 for just compensation, premised on the theory that the land-use restrictions in effect during the various periods had effected a taking of petitioners' property, remained pending. See Pet. App. 82.

b. The district court held that petitioners' claims regarding Period IV were barred by the applicable statutes of limitations. Pet. App. 128-155. In a subsequent opinion, the district court held that petitioners were entitled to just compensation for Periods I and II, when Ordinance 81-5 and Resolution 83-21 were in effect, but not for Period III. *Id.* at 57-127.

With respect to Periods I and II, the court first held that "[i]f * * * [respondent's] actions effected only a partial denial of economically viable use," then the test described in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978), would apply and would "clearly lead[] to the conclusion that there was no taking." Pet. App. 88. Under that test, the court explained, given the temporary nature of the restrictions and the length of time property was typically held in the Basin prior to development, petitioners did not have reasonable investment-backed expectations in being able to build single-family homes on their land while the temporary moratorium was in effect. *Id.* at 88-90. The court further determined that the absence of any evidence "regarding the specific diminution in value of any of [petitioners'] individual properties," as well as the "character of the governmental action," weighed against finding a taking under *Penn Central*. *Id.* at 90. The court explained that respondent "took the necessary steps" to "solv[e] a serious problem," while petitioners "retained many important rights

of property ownership, such as the right to exclude others from their own land." *Id.* at 91.

The district court nevertheless held that Ordinance 81-5 and Resolution 83-21 had effected a taking of petitioners' property. The court concluded that *Penn Central* did not govern because the ordinance and resolution had foreclosed "all economically viable uses" of petitioners' property during the periods they were in effect and thereby resulted in a "total taking" of petitioners' property under *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992). Pet. App. 92-101. The court rejected respondent's contention that no taking had occurred because Ordinance 81-5 and Resolution 83-21 were "reasonable temporary planning moratoria." *Id.* at 109-115. Although the court observed that it "d[id] not see how TRPA could have reached agreement on a regional plan any sooner" than it did, *id.* at 115, it read this Court's decisions in *Lucas* and *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304 (1987), to require compensation, at least where the relevant moratoria did not provide for termination on a specified date. Pet. App. 113-115.

Finally, the district court held that petitioners were not entitled to compensation for Period III because the 1984 Regional Plan was not the "proximate cause" of petitioners' inability to develop their land during that interval. Pet. App. 101-108. Rather, the court explained, "[t]he real cause of [petitioners'] harm after the T.R.O. was entered was the effect of the T.R.O. and the Preliminary Injunction [see p. 4, *supra*], not the 1984 Plan." *Id.* at 106.

4. The court of appeals affirmed in part and reversed in part. Pet. App. 1-56.

a. The court of appeals reversed the district court's holding that petitioners were entitled to compensation for the restrictions on development during Periods I and II. Pet. App. 14-40. The court noted that "the only question"

before it was "whether a categorical taking occurred" under *Lucas*, because petitioners had disavowed any reliance on *Penn Central*'s ad hoc balancing approach. *Id.* at 18-19. The court explained that, except in cases involving physical occupation of real property, a landowner generally may not establish a taking by demonstrating an inability to use some discrete segment of the land, even if the effect of the restriction is to diminish the value of the property as a whole. *Id.* at 20-27. The court found "no plausible basis on which to distinguish a similar diminution in value that results from a temporary suspension of development." *Id.* at 27. The court also concluded that "[i]n several ways, temporary development moratoria promote effective planning," *ibid.*, and that courts should be "exceedingly reluctant to adopt rulings that would threaten the survival of this crucial planning mechanism," *id.* at 28.

b. The court of appeals affirmed the district court's holding that petitioners were not entitled to compensation for Periods III and IV. Pet. App. 40-56. With respect to Period III, the court determined (see *id.* at 40-47) that petitioners could not establish the requisite causal link between the 1984 Regional Plan and their inability to develop their properties because "the injunction issued [in the parallel lawsuit] effectively prohibited the implementation of the 1984 Plan." *Id.* at 43. With respect to Period IV, the court agreed with the district court that petitioners' takings claims were barred by the applicable statutes of limitations. *Id.* at 47-56.

c. Five judges dissented from the denial of rehearing en banc. Pet. App. 157-167. Those judges reasoned that "[t]he only difference between this case and *Lucas* is that the regulation here had a finite duration," and they construed this Court's decision in *First English* to require compensation in this setting. *Id.* at 159.

SUMMARY OF ARGUMENT

A. A characteristic feature of land-use regulation is the requirement that a property owner obtain affirmative government authorization, typically in the form of a building permit, before commencing substantial development. Such a generally applicable permit requirement, and the attendant inability to develop the land in the interim, are highly unlikely to eliminate the value of real property, do not impose inordinate burdens on isolated landowners, and are among the background legal principles that serve to define the landowner's interests. The application of such permitting requirements to a particular tract therefore does not raise any serious issue under the Just Compensation Clause.

B. Temporary moratoria can serve an important function in land-use planning and protection of critical natural resources. Although a particular moratorium could give rise to takings concerns because of its scope, duration, purposes, or impact on certain landowners, the mere possibility of such effects provides no justification for a categorical rule. Even without announcing a formal development moratorium, a permitting agency could consider overall patterns of actual or anticipated development in ruling on individual permit applications, and it could defer action on individual applications pending clarification or amendment of the substantive permitting criteria. A formal, publicly-announced temporary moratorium simply increases the predictability and transparency of the land-management process. And like the requirement of prior government approval for development of an individual tract, the use of temporary moratoria covering a broader area is a land-management tool with a well-established tradition.

C. This Court's decision in *First English* does not support petitioners' claim of a per se taking. The Court in *First English* specifically disavowed any suggestion that its holding encompassed government efforts to preserve the status

quo pending a final decision as to the propriety of development. The Court's decision focused on a question of *remedy—i.e.*, whether the government is constitutionally required to pay compensation for a proven taking—rather than on the antecedent question whether a taking had occurred. Likewise, the moratorium at issue here differs sharply from the development ban in *Lucas*. The moratorium was temporary; it secured a reciprocity of advantage to a broad group of landowners rather than imposing disproportionate burdens on an isolated few; it did not effectively press private land into public service; and it was rooted in well-established background property-law principles.

ARGUMENT

A TEMPORARY DEVELOPMENT MORATORIUM, REASONABLY DESIGNED TO PRESERVE THE STATUS QUO PENDING COMPLETION OF A COMPREHENSIVE LAND-USE PLAN, DOES NOT EFFECT A PER SE TAKING OF PROPERTY

Until this Court's decision in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922), "it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, or the functional equivalent of a 'practical ouster of [the owner's] possession.'" *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992) (citations omitted). The Court has since concluded, however, that even where an owner is not divested of title to or possession of real property, land-use regulation may effect a compensable taking if it trenches too severely upon the prerogatives that have traditionally accompanied ownership. See *id.* at 1014-1019; *Palazzolo* v. *Rhode Island*, 121 S. Ct. 2448, 2457 (2001). In particular, regulation that permanently deprives the owner of all economically beneficial use of land typically requires the payment of just compensation even though it does not involve a "direct appropriation" of the property involved.

Lucas, 505 U.S. at 1015-1016; see *Palazzolo*, 121 S. Ct. at 2457.

Lucas does not support petitioners' claim that a per se taking occurs as a consequence of temporary development restrictions that are intended to preserve the status quo pending a final government decision regarding the permissible uses of the land. Significant development of real property typically requires the *prior* approval of some official body—most obviously in the form of a building permit—and government has never been thought to "take" property simply by requiring that it be kept in its present state during the pendency of a reasonable deliberative process. Although a temporary development moratorium to allow land-use authorities to determine appropriate permitting criteria is different in some respects from the delay attendant to a permitting process, there is no basis for petitioners' *categorical* claim that such a moratorium constitutes a taking per se.

Petitioners devote considerable rhetorical energy to the assertion that the development restrictions at issue in this case were in fact permanent. Those contentions disregard the rulings by both courts below, unchallenged here, that rejected petitioners' takings claims for any period after Resolution 83-21 expired in April 1984 (see pp. 5, 6, 7, *supra*), and they are simply unresponsive to the question presented as framed by this Court, which is expressly limited to whether a "temporary moratorium" is an ipso facto taking. See 121 S. Ct. 2589, 2589-2590 (2001). The Court's disposition of that question, moreover, will control future cases involving temporary moratoria, including those (presumably the vast majority) in which development is permitted to go forward after the moratorium expires. We therefore address the question on which this Court granted certiorari: whether the 32-month development moratorium imposed by Ordinance 81-5 and Resolution 83-21 effected a taking of property requiring payment of just compensation.

Petitioners do not contend in this Court that the process of developing the 1984 Regional Plan was unduly protracted, or that the development restrictions imposed by Ordinance 81-5 and Resolution 83-21 were more extensive than necessary to preserve the status quo pending respondent's development of the environmental threshold carrying capacities and completion of a new regional plan, as required by the 1980 Compact. Nor, more generally, do petitioners seek to establish a taking under the multi-factor test set forth in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978). The district court specifically found that respondent could not have completed its plan more quickly than it did and that there was no taking under *Penn Central*, and on appeal petitioners disavowed any claim of a taking under *Penn Central*. See pp. 6-7, *supra*. Petitioners raise instead the categorical claim that any and all temporary moratoria on the issuance of building permits are takings under this Court's decision in *Lucas*. In that context, the 32-month moratorium should therefore be assumed to have been reasonable in scope and duration, given its stated objective.[1]

A. Substantial Development Of Real Property Typically Requires The Prior Approval Of Land-Use Authorities, And Reasonable Delays In Development Resulting From The Permit Application Process Do Not Effect A Taking

1. "[T]he authority of state and local governments to engage in land use planning has been sustained against constitutional challenge as long ago as [this Court's] decision in *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926)."

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[1] The district court rejected as "completely meritless" petitioners' earlier claim that respondent had "acted in bad faith in complying with the [1980] Compact requirements." Pet. App. 68. The court found that respondent had "clearly approached its obligations under * * * the Compact * * * with good faith and to the best of its ability." *Id.* at 69.

Dolan v. *City of Tigard*, 512 U.S. 374, 384 (1994). A characteristic feature of land-use regulation is the requirement that a property owner obtain the affirmative approval of a designated governmental body *before* commencing substantial development. This Court has never suggested that a landowner's inability to develop his property during the permit application process presents a takings problem or requires the payment of just compensation. Indeed, such a claim runs counter to a number of this Court's precedents.

For example, in *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127 (1985), which concerned permits issued by the Corps of Engineers for the filling of wetlands adjacent to navigable waters, the Court observed that "[a] requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired." The Court concluded that "[o]nly when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred." *Ibid.* That analysis is inconsistent with any claim that a permit requirement causes a temporary taking whenever its effect is to prevent economically viable use of land during the application process.

In the same vein, the Court in *Agins* v. *City of Tiburon*, 447 U.S. 255 (1980), explained (in the context of municipal precondemnation activities) that "[m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a "taking" in the constitutional sense.'" *Id.* at 263 n.9 (quoting *Danforth* v. *United States*, 308 U.S. 271, 285 (1939)).

Any theory under which a taking would be deemed to have occurred as a result of the time required for landowners and responsible governmental officials to comply with and

implement permit requirements would also be inconsistent with this Court's ripeness jurisprudence. A plaintiff who asserts a regulatory takings claim must generally "allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law. As a general rule, until these ordinary processes have been followed the extent of the restriction on property is not known and a regulatory taking has not yet been established." *Palazzolo*, 121 S. Ct. at 2459; accord *Suitum* v. *Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733-739 (1997). That analysis necessarily presumes that a permit requirement does not itself effect a taking, even when it temporarily prevents economically viable use of the land pending a final decision by the agency.

2. It follows *a fortiori* that a temporary prohibition on development pending completion of the permit application process does not constitute a per se taking under *Lucas*. The rationales on which the Court relied in *Lucas* are inapplicable in that context.

First, because "the very existence of a permit system implies that permission may be granted," *Riverside Bayview*, 474 U.S. at 127, a temporary bar on development for the duration of the permitting process leaves open the potential for future productive uses and is therefore exceedingly unlikely to eliminate the property's value, even on a temporary basis. Accordingly, in contrast to the permanent construction ban at issue in *Lucas*, which "rendered valueless" the plaintiff's beachfront lots, 505 U.S. at 1020, a temporary development ban incident to the permitting process cannot reasonably be regarded as the practical "equivalent of a physical appropriation," *id.* at 1017.

Second, the Court in *Lucas* emphasized that "in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted," development restrictions cannot reasonably be assumed to "secure[] an 'av-

erage reciprocity of advantage' to everyone concerned." 505 U.S. at 1017-1018 (quoting *Mahon*, 260 U.S. at 415). There is nothing in the least "extraordinary," however, about land-use regulation that requires everyone to obtain prior government authorization for significant development within a defined geographic area. Such generally applicable requirements do not remotely implicate "the purpose of the Takings Clause, which is to prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Palazzolo*, 121 S. Ct. at 2457-2458 (quoting *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960)). Rather, the requirement of prior government approval secures a reciprocity of advantage to landowners within the relevant area by providing greater assurance that restrictions intended to further the interests of the community as a whole will be enforced in a consistent manner. Cf. *Agins*, 447 U.S. at 262 ("The zoning ordinances benefit the appellants as well as the public * * * in assuring careful and orderly development of residential property.").

Third, the Court concluded in *Lucas* that "the *functional* basis for permitting the government, by regulation, to affect property values without compensation"—that "Government hardly could go on" if it were required to pay for every diminution in value caused by regulation, see *Mahon*, 260 U.S. at 413—does not apply to the "relatively rare situations where the government has deprived a landowner of all economically beneficial uses" of property on a permanent basis. 505 U.S. at 1018. That functional basis plainly does apply, however, to the effects of a prior-approval requirement that is applicable to all owners of property in the vicinity.

Fourth, a permit requirement does not "carry with [it] a heightened risk that private property is being pressed into some form of public service." *Lucas*, 505 U.S. at 1018. In particular, the general rule that land must remain undeveloped during the period necessary for compliance with the

permit process does not reflect a determination that any given parcel of land should be preserved in its natural state on a permanent basis to further a public interest. That rule serves instead to assure the integrity of the permitting process by maintaining the status quo until land-use officials have reached a final decision regarding the propriety of development on any particular tract.

Finally, even when land-use regulation prevents all economically beneficial use of a parcel on a permanent basis, the Fifth Amendment does not require the payment of just compensation if the pertinent restriction is derived from "background principles of the State's law of property and nuisance"—*i.e.*, "those common, shared understandings of permissible limitations derived from a State's legal tradition." *Palazzolo*, 121 S. Ct. at 2464; see *Lucas*, 505 U.S. at 1029-1031. The rule that significant development of real property requires prior government approval likewise constitutes an established background principle. "[A]bsent extraordinary delay" in that process, any economic loss that a landowner may suffer as a result of the temporary inability to develop his property while he is seeking a permit is simply an "incident[] of ownership." *Agins*, 447 U.S. at 263 n.9.

Significantly, moreover, a permitting system typically is subject to built-in protections against "extraordinary delay." Federal permitting agencies, for example, are subject to the requirement in the Administrative Procedure Act that, "[w]ith due regard for the convenience and necessity of the parties or their representatives and *within a reasonable time*, each agency shall proceed to conclude a matter presented to it." 5 U.S.C. 555(b) (emphasis added). That duty is judicially enforceable under 5 U.S.C. 706(1), which authorizes a district court to "compel agency action unlawfully withheld or unreasonably delayed." What constitutes a "reasonable" time may vary from case to case and must take into account the steps the agency must take to assess the proposed development. But the existence of that statutory

protection and the right to enforce it essentially remove any basis for a takings claim resulting from the implementation of the permit process itself.

B. A Reasonable Moratorium On Development Pending Completion Of A Comprehensive Land-Use Plan Does Not Constitute A Per Se Taking Under *Lucas*

The question in this case is whether a temporary development moratorium intended to preserve the status quo pending the government's adoption of a comprehensive land-use plan constitutes a per se taking under *Lucas*. For a number of reasons, treatment of such moratoria as per se takings is unwarranted.[2]

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[2] Courts have consistently held that development moratoria adopted by local governments pending study and formulation of land-use plans do not effect a taking. See, *e.g. Jackson Court Condominiums, Inc.* v. *City of New Orleans*, 874 F.2d 1070, 1080-1082 (5th Cir. 1989); *Mont Belvieu Square, Ltd.* v. *City of Mont Belvieu*, 27 F. Supp. 2d 935, 942-943 (S.D. Tex. 1998); *Zilber* v. *Town of Moraga*, 692 F. Supp. 1195, 1206-1207 (N.D. Cal. 1988); *Kelly* v. *Tahoe Reg'l Planning Agency*, 855 P.2d 1027, 1032-1035 (Nev. 1993), cert. denied, 510 U.S. 1014 (1994); *Long Beach Equities, Inc.* v. *County of Ventura*, 231 Cal. App. 3d 1016, 1035-1036 (1991), cert. denied, 505 U.S. 1219 (1992); *Tocco* v. *New Jersey Council on Affordable Housing*, 576 A.2d 328, 329-331 (N.J. Super. Ct. 1990), cert. denied, 499 U.S. 937 (1991); *First English Evangelical Lutheran Church* v. *County of L.A.*, 210 Cal. App. 3d 1353, 1372-1374 (1989), cert. denied, 493 U.S. 1056 (1990); *McCutchan Estates Corp.* v. *Evansville-Vanderburgh County Airport Auth. Dist.*, 580 N.E.2d 339, 342-343 (Ind. Ct. App. 1991); see also 83 Am. Jur. 2d, *Zoning and Planning* §§ 161-163 (1992 & Supp. May 2001). The courts have reached that conclusion even where development moratoria allegedly denied owners all economically viable use of their property for a temporary period, so long as the moratoria were of reasonable duration and reasonably necessary to further the public welfare. See, *e.g., Santa Fe Vill. Venture* v. *City of Albuquerque*, 914 F. Supp. 478, 483 (D.N.M. 1995); *Williams* v. *City of Central*, 907 P.2d 701, 703-706 (Colo. Ct. App. 1995); *Woodbury Place Partners* v. *City of Woodbury*, 492 N.W.2d 258, 260-263 (Minn. Ct. App. 1992), cert. denied, 508 U.S. 960 (1993).

1. Temporary moratoria differ in certain respects from the postponement of development that necessarily results from the requirement of prior government approval of individual permit applications. Development moratoria typically are formally and publicly adopted by the legislature or responsible agency, and they apply generally and uniformly to a given category of property. They may serve a range of purposes, from affording time to study the impacts of anticipated development, to preparing new permitting criteria, to allowing for the installation of new infrastructure. Such temporary measures can promote responsible regulation and sound development in ways that the individualized permitting process sometimes cannot. See generally Pet. App. 27-28.

At the same time, because a moratorium (like the prohibition against development during the permit process) is designed to maintain the status quo for a temporary period pending the completion of governmental action, it typically does not interfere with any *existing* uses of property or with such essential aspects of the bundle of property rights as the right to exclude others, see *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987), to sell the property, see *Andrus* v. *Allard*, 444 U.S. 51 (1979), or to transfer it by devise or intestacy, see *Hodel* v. *Irving*, 481 U.S. 704 (1987). For these reasons, there is nothing inherent in the nature of a temporary moratorium on new development to suggest that *all* such moratoria should be held to be takings through an extension of *Lucas*'s per se rule.

2. The court of appeals judges who dissented from denial of rehearing en banc suggested that categorical treatment of temporary moratoria as per se takings is necessary to prevent land-use agencies from "enact[ing] one moratorium after another, perhaps indefinitely." Pet. App. 164. The *possibility* that a particular interim restriction might be abused or go "too far," *Mahon*, 260 U.S. at 415, however, provides no basis for a categorical rule covering all moratoria, regardless

of their scope, duration, and purpose, and the degree of development permitted at their conclusion. The per se rule announced in *Lucas* has never been invoked as a broad prophylactic, but instead has been reserved for the "extraordinary circumstance" (*Lucas*, 505 U.S. at 1017) in which land-use regulation operates as the functional equivalent of a direct appropriation of property.[3] Rather, an allegation that a particular moratorium is unreasonably protracted or unduly broad in scope—or that it is not justified by its stated objective or imposes inordinate burdens on isolated landowners—can be more appropriately and fully addressed under the *Penn Central* framework that governs regulatory takings claims generally. See *Palazzolo*, 121 S. Ct. at 2467 (O'Connor, J., concurring) ("The temptation to adopt what amount to *per se* rules in either direction must be resisted.").

3. Petitioners attempt to distinguish the temporary moratorium at issue here from the permit application process, on the ground that a landowner who seeks a development permit "is participating with the expectation—or at least the possibility—of obtaining development permission at the conclusion." Pet. Br. 28. But the same presumption should be accorded the moratorium in this case. Indeed, the process of fashioning the 1984 Regional Plan entailed "extensive public involvement," *California ex rel. Van de Kamp* v. *Tahoe Regional Planning Agency*, 766 F.2d 1308, 1311 (9th Cir. 1985), including participation by affected landowners. And the announcement of a *temporary* development

[3] There is no basis, either in this case (see note 1, *supra*) or generally, for denying state and federal land-use regulators the "presumption of legitimacy," *United States Dep't of State* v. *Ray*, 502 U.S. 164, 179 (1991), that is generally accorded to the conduct of government officials. Takings claimants should, of course, be given an adequate opportunity to prove that particular governmental actions are abusive or irrational. But given the strong legitimate justifications for such temporary development moratoria, see Pet. App. 27-28, use of such planning mechanisms cannot fairly be *presumed* to reflect governmental bad faith.

ban certainly implied at least the possibility that petitioners and others could "obtain[] development permission at the conclusion." Pet. Br. 28; compare *Riverside Bayview Homes*, 474 U.S. at 127.

A temporary development moratorium may understandably be regarded by some property owners as increasing the burdens associated with the underlying permit requirement. Because a moratorium typically prevents the permit process from going forward at all, see Pet. App. 113, once the moratorium expires, a landowner will then confront whatever further delays the permitting process itself entails. In addition, the practical effect of a moratorium is to suspend the application of substantive criteria to potential development projects while it remains in effect; where (as here) it is contemplated that new criteria will be issued at the end of the moratorium, it may also introduce an added measure of uncertainty as to whether (or to what extent) development of any particular tract will be allowed. And, finally, because no land-use agency is likely to employ moratoria on a routine basis, the bases for challenging the agency's conduct of the permitting process may be more familiar and better established than the grounds for contesting a moratorium as arbitrary or factually unjustified. See 5 U.S.C. 706(2).

In the end, however, those differences in the nature or perception of a moratorium as compared with the ordinary operation of a permitting process either are differences in degree or reflect merely an unsettling of unilateral or subjective expectations concerning possible future development that are not in themselves protected by the Just Compensation Clause. Those generalizations do not justify categorical treatment of development moratoria as per se takings.

Agency permitting processes (and the experience of different landowners in seeking permits under them) will themselves vary widely in their duration and complexity. The fact that a particular application process (or a particular landowner's invocation of that process) lasts longer—per-

haps even much longer—than the average does not necessarily mean that the relevant agency has behaved unreasonably under the circumstances or that a taking has occurred. The per se rule described in *Lucas* applies by its terms "where regulation denies all economically beneficial or productive use of land," 505 U.S. at 1015; the burden on the landowner that in extreme cases justifies a categorical approach is the inability to develop the property, not the inability to have a permit application accepted for processing. If a particular moratorium significantly increases the total period during which a landowner is unable to develop his property, that difference in degree may be relevant to the *Penn Central* analysis, but it does not amount to a difference in kind warranting application of a per se rule. In fact, the agency's resolution of recurring factual and policy issues during a planning moratorium may expedite its subsequent processing of individual permit applications.

Because a land-use agency's consideration of individual permit applications cannot be accomplished overnight, any legal regime that requires *prior* government approval has the necessary practical effect of temporarily foreclosing significant development during the application process. The requirement of prior government authorization thus reflects a "conscious governmental decision to freeze temporarily all use of property" (Pet. Br. 12) until the government has reached a final decision, even though the postponement of development is simply a means of preserving the status quo rather than an end in itself. Similarly here, the freeze on processing permits for new development was not imposed for its own sake, but was instead the byproduct of the complex and time-consuming nature of the planning process that was required before development could proceed. Although respondent's decision to postpone processing of development permits until it completed the regional plan required by the Compact may have been more definitive and extensive than is typically the case when a land-use agency takes a particular permit application under advisement, that is scarcely a reason to treat the moratorium as a per se taking. Indeed, the features of a moratorium that might cause it to strike some landowners as unfair might also be seen as characteristics of orderliness, regularity, and equality of treatment in a planning process that will affect the entire community. In particular, the moratorium prevents the possibility that some landowners will be able to proceed in ways detrimental to remaining landowners.

4. In determining whether proposed construction should be permitted on an individual parcel, a land-use agency implements broader policy goals. See, *e.g.*, *Suitum*, 520 U.S. at 738 (noting "the high degree of discretion characteristically possessed by land-use boards"). A rational system of land-use regulation seeks to ensure that similarly-situated property owners are treated equitably, and that permitting decisions on individual tracts reflect an awareness of actual or anticipated development in the surrounding area. A permitting agency that is simultaneously considering several development applications for tracts in close proximity to each other would be expected to assess the likely cumulative impacts of the various proposals, and might reasonably decline to render a final decision on any of the applications until it had determined the appropriate disposition of them all. If a significant change in the applicable development criteria was known to be imminent, a rational agency could take that fact into account as well in ruling on a pending permit application.[4]

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[4] As one commentator has explained, "[t]he courts have long upheld the right of a municipality to deny administratively a building permit to a developer where the use would conflict with a proposed change in the zoning ordinance which has been aired at public hearing or published in a newspaper of general circulation." Robert H. Freilich, *Interim Development Controls: Essential Tools for Implementing Flexible Planning and Zoning*, 49 J. Urb. Law 65, 86 (1971).

By the same token, if significant doubt exists as to what substantive land-use standards will be adopted in the near future, a rational permitting agency would certainly consider delaying action on a pending application until the new standards were adopted. A contrary approach would simply exacerbate the risk that owners of adjacent parcels will be subject to substantially different long-term use restrictions based on the fortuity that one owner submits a development application slightly before the other. That result would be at odds both with sound land-management principles and with the values that the Just Compensation Clause is intended to protect.

Thus, with or without the use of formal temporary development moratoria, land-management agencies could legitimately defer action on individual permit applications pending clarification or amendment of the substantive permitting criteria. Indeed, in a variety of situations, the courts have recognized the authority of federal administrative agencies to suspend action on permit requests or similar applications pending consideration of possible changes to the governing standards. See, *e.g.*, *Western Coal Traffic League* v. *Surface Transp. Bd.*, 216 F.3d 1168, 1172-1176 (D.C. Cir. 2000) (discussing cases). Moreover, this Court has long recognized that "[i]n performing its important functions * * *, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202 (1947); see, *e.g.*, *Mobil Oil Exploration & Producing S.E., Inc.* v. *United Distribution Cos.*, 498 U.S. 211, 228 (1991); *Heckler* v. *Campbell*, 461 U.S. 458, 461, 467-468 (1983); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 292-294 (1974).

The Just Compensation Clause does not deprive a land-use agency of that flexibility and require it to adopt a system of case-by-case adjudication rather than rulemaking—or case-by-case deferral of individual permit applications rather

than a moratorium of general applicability—when the agency considers a problem that relates to a number of separate parcels. A formal, publicly-announced temporary moratorium while the agency develops criteria of general applicability increases the predictability and transparency of the land-management process, and it provides an opportunity for broad public input that would be lacking if the agency sought to resolve recurring factual or legal issues in the ad hoc process of individual permit processing. Treatment of express development moratoria as per se takings would create perverse incentives for land-use agencies to perform their functions in a less systematic and accountable way.

5. Landowners who had not already obtained a building permit at the time the temporary moratorium went into effect would not have had any reasonable expectation that they would be able to develop their property *immediately*. Any such "unilateral expectation" on a landowner's part would have been inconsistent with the established requirement that a landowner obtain a permit before commencing construction. Compare *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1005-1008 (1984). Moreover, although zoning or other laws in effect prior to the temporary moratorium might have allowed the landowners to obtain a permit for certain development if they had applied for one, the landowners had no *property* interest in being able to do so, and the responsible legislatures and land-use agencies were free to amend the applicable laws, regulations, and plans.

Under the law of both California and Nevada, as under the law of many States, a landowner ordinarily attains a "vested right" to proceed with development despite an intervening change in the law only if he has already received a permit and committed substantial resources in reliance thereon. See, *e.g.*, *Avco Cmty. Developers, Inc.* v. *South Coast Reg'l Comm'n*, 17 Cal. 3d 785, 791 (1976), cert. denied, 429 U.S. 1083 (1977); *American W. Dev., Inc.* v. *City of Henderson*, 111 Nev. 804, 807 (1995). Only at that point does a landowner

have distinct investment-backed expectations, and a distinct *property*-type interest (beyond his ownership of the land itself) in being able to proceed immediately with development. Compare *Penn Central*, 438 U.S. at 127-128; *Mahon*, 260 U.S. at 412, 414. These longstanding state-law principles are entitled to substantial weight in applying the Just Compensation Clause to this setting. See *Dolan*, 512 U.S. at 388-391.

6. As the court of appeals recognized, temporary development moratoria represent "an important land-use planning tool with a well-established tradition." Pet. App. 27; see *id.* at 109 ("[z]oning boards, cities, counties, and other agencies [have historically] used [interim planning moratoria] all the time to maintain the status quo pending study and governmental decision making") (internal quotation marks omitted). As early as 1925, the California Supreme Court sustained the validity of an emergency interim ordinance that prohibited the construction of multi-family dwellings in part of Los Angeles while a comprehensive zoning plan was contemplated. *Miller* v. *Board of Pub. Works of City of L.A.*, 195 Cal. 477, 496-497 (1925), error dismissed, 273 U.S. 781 (1927). The court explained:

> It is a matter of common knowledge that a zoning plan of the extent contemplated in the instant case cannot be made in a day. Therefore, we may take judicial notice of the fact that it will take much time to work out the details of such a plan and that obviously it would be destructive of the plan if, during the period of its incubation, parties seeking to evade the operation thereof should be permitted to enter upon a course of construction which might progress so far as to defeat in whole or in part the ultimate execution of the plan.

195 Cal. at 496. Other courts of the same era likewise upheld the validity of interim land use planning ordinances. See, *e.g.*, *Downham* v. *City Council*, 58 F.2d 784, 788 (E.D. Va. 1932); *Fowler* v. *Obier*, 7 S.W.2d 219, 226 (Ky. 1928); *Mc-*

Curley v. *City of El Reno*, 280 P. 467, 469-472 (Okla. 1929); *City of Dallas* v. *Meserole*, 155 S.W.2d 1019, 1022-1023 (Tex. Civ. App. 1941). In 1953, the California Legislature enacted a law that essentially codified the principles of the *Miller* rule. Cal. Gov't Code § 65806 (West 1955), superseded by Cal. Gov't Code § 65858 (West 1997 & Supp. 2001).

The moratorium at issue in this case, and the moratorium imposed by the Compact itself, were intended "to halt temporarily works of development in the region which might otherwise absorb the entire capability of the region for further development or direct it out of harmony with the ultimate plan." 1980 Compact, Art. VI(c). The challenged moratorium therefore fits comfortably within an established land-management tradition. The potential application of interim development restrictions designed to maintain the status quo pending completion of a comprehensive plan—like the requirement of affirmative government authorization as a precondition for significant development of an individual tract (see pp. 11-16, *supra*)—is among the "background principles" (*Palazzolo*, 121 S. Ct. at 2464) that have long served to define the property interests of landowners within the Lake Tahoe region. So long as the 32-month moratorium at issue here was reasonable in scope and duration—a proposition that petitioners do not here contest—it did not give rise to a taking, even if it foreclosed immediate economically beneficial use of some parcels during the period that it was in effect.

C. This Court's Decision In *First English* Does Not Suggest That A Temporary Development Moratorium Effects A Per Se Taking Of Property

1. The Court in *First English* specifically noted that its decision "d[id] not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, *changes in zoning ordinances*, variances, and the like which are not before us." 482 U.S. at 321 (em-

phasis added). The Court thus disavowed any suggestion that its holding encompassed government efforts to preserve the status quo pending a final decision as to the propriety of development. The underscored language, moreover, indicates that the Court did not distinguish between delays resulting from the government's application of existing permitting standards to individual permit applications and delays resulting from actual or anticipated changes to the standards themselves.

2. In *First English*, the Court held that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." 482 U.S. at 321. In holding that the case was ripe for decision, the Court emphasized that the California Court of Appeal had assumed the existence of a taking, but had nevertheless affirmed the trial court's dismissal of the landowner's claim for damages on the ground that the remedy for any taking was limited to equitable relief. *Id.* at 311. This Court found that "[t]he [state court's] disposition of the case on these grounds isolates the remedial question for our consideration." *Ibid.* The holding of *First English* was thus limited to the appropriate *relief* for an established (or assumed) taking; the Court did not decide the antecedent question whether a taking had occurred.

3. The Court in *First English* framed the question presented as whether the Constitution "require[s] compensation as a remedy for 'temporary' regulatory takings—those regulatory takings which are ultimately invalidated by the courts." 482 U.S. at 310. The Court thus focused on development restrictions that are "retrospectively temporary," Pet. App. 111—*i.e.*, that are intended when adopted to be permanent and are "rendered temporary only when an ordinance that effects a taking is struck down by a court," *id.* at 30. Absent a requirement to pay compensation in that setting, a governmental body could impose draconian con-

straints on development, defend against the ensuing takings claims in court, and simply rescind the offending regulation without financial liability if the litigation terminated unfavorably. A development moratorium that is intended from the outset to remain in effect only for a limited period raises no comparable danger of manipulation.

4. In discussing the remedial issue in *First English*, the Court observed, by way of analogy, that "[t]he United States has been required to pay compensation for leasehold interests of shorter duration than" the period (slightly less than seven years) between the effective date of the challenged land-use restriction and the California Supreme Court's denial of review. 482 U.S. at 319. As the district court in this case pointed out, at least two of the cases on which the *First English* Court relied "involved appropriations of property that *were* prospectively temporary—the government had appropriated leasehold interests with fixed termination dates." Pet. App. 114. The district court believed that analogy in *First English* supported the finding of a taking here. *Ibid.*

The district court was mistaken for two reasons. First, this Court has distinguished for takings purposes between a permanent physical occupation and a temporary physical invasion of real property. See *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 428, 433, 444 (1982); *Lucas*, 505 U.S. at 1015, 1028-1029. Any analogy between physical and regulatory takings therefore does not support the view that a temporary ban on economically productive uses of land effects a per se taking. Cf. *Block* v. *Hirsh*, 256 U.S. 135, 157 (1921) (Holmes, J.) ("A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change.").

Second, in the cases involving leasehold interests to which the district court referred—*United States* v. *Petty Motor Co.*, 327 U.S. 372 (1946), and *United States* v. *General Motors Corp.*, 323 U.S. 373 (1945)—the governmental action

ousted the private occupant in favor of the government's occupying and using the property for its own purposes It therefore would have constituted a taking if the property had never been leased. Here, by contrast, the moratorium resulted in no interference with petitioners' right to exclude others from their property, no occupation or use of the property by the government for its own purposes, and no deprivation of any other fundamental "stick" in the bundle of rights associated with property.

The Court may nevertheless assume, arguendo, that there could be circumstances in which even land-use regulation that was intended from the outset to be temporary should be analyzed under the *Lucas* per se takings approach, rather than under *Penn Central*. That would be so, however, only if the regulation precluded all economically viable use of property during the period it was in effect *and* also shared the other characteristics of the regulation that was found in *Lucas* to be a per se taking—*i.e.*, if the regulation imposed markedly disproportionate burdens on isolated landowners rather than securing a reciprocity of advantage to a broad community, effectively pressed private property into public service (albeit for a finite period), and represented a significant departure from background property-law principles. Compare *Lucas*, 505 U.S. at 1017-1018, 1029-1031. That test is not satisfied in this case. Although the district court found (and the court of appeals assumed for purposes of its decision) that petitioners' tracts were insusceptible of any economically beneficial use during the 32-month period the moratorium was in effect, see Pet. App. 96-101, 33-34 n.20, in all other respects the moratorium differs sharply from the prohibition involved in *Lucas*.

As the district court found, the temporary development restrictions at issue in this case "had wide-spread application, and were not aimed at an individual landowner." Pet. App. 86; compare *Lucas*, 505 U.S. at 1008 (noting that the plaintiff's "intention with respect to the lots was to do what

the owners of the immediately adjacent parcels had already done: erect single-family residences").[5] The moratorium secured a reciprocity of advantage to landowners in the Lake Tahoe area. Because the value of petitioners' tracts is ultimately dependent on the preservation of the region's natural beauty, respondent's efforts to prevent unconstrained development on a temporary basis during an orderly planning process thus benefited petitioners as well as other landowners and the general public. See *Kelly* v. *Tahoe Reg'l Planning Agency*, 855 P.2d 1027, 1035 (Nev. 1993), cert. denied, 510 U.S. 1041 (1994).

The moratorium did not reflect a final determination that maintenance of the relevant lands in their natural state was necessary or desirable for its own sake. It was instead adopted simply to preserve the status quo pending completion of a comprehensive regional plan. Its promulgation therefore creates no "heightened risk that private property is being pressed into some form of public service." *Lucas*, 505 U.S. at 1018.

Finally, requiring a landowner to defer development for a reasonable period, while government officials determine whether improvement of the land is consistent with criteria

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[5] The 32-month moratorium affected approximately 8000 to 9000 undeveloped single-family lots in the Lake Tahoe Basin in the early 1980's. See J.A. 74-75. Less than half of the acreage zoned for residential development in the Basin was actually developed when the TRPA moratorium was instituted. See Tahoe Regional Planning Agency, *Environmental Impact Statement for Adoption of a Regional Plan for the Lake Tahoe Basin* 11 (Feb. 1983). The fact that the moratorium was limited to new development, and did not require the destruction of existing buildings, is neither anomalous nor unfair. Respondent's decision not to disturb existing uses of land in the Basin was consistent with traditional regulatory practice. See, *e.g.*, *Penn Central*, 438 U.S. at 125 ("Zoning laws generally do not affect existing uses of real property."). A requirement that existing homes be leveled, moreover, would have destroyed *distinct* property interests of their owners—*i.e.*, the houses themselves—that the owners of undeveloped parcels did not have.

that are necessary to protect vital natural resources, fully accords with applicable background property-law principles—"those common, shared understandings of permissible limitations derived from a State's legal tradition." *Palazzolo*, 121 S. Ct. at 2464. The requirement of prior government authorization of significant development was "a preexisting limitation upon the landowner's title." *Lucas*, 505 U.S. at 1028-1029. Respondent might have deferred ruling on any particular permit application for a reasonable period of time pending completion of the 1984 Regional Plan, without effecting a taking of the parcel for which development authorization was sought. The formal announcement that a temporary development ban would also apply to other parcels benefits rather than injures the parcel owner, and it provides no basis for triggering a per se constitutional rule.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

JOHN C. CRUDEN
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

MALCOLM L. STEWART
Assistant to the Solicitor General

PETER H. OPPENHEIMER
Attorney

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IN THE
Supreme Court of the United States

TAHOE-SIERRA PRESERVATION COUNCIL, INC., *et al.*,

Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY, *et al.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Douglas B. Levene
c/o Philip Morris Capital Corp.
Legal Department
225 High Ridge Road
Suite 300
Stamford, CT 06905
(914) 335-8347

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal
Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Date: September 12, 2001

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QUESTION PRESENTED

Whether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the Takings Clause of the United States Constitution?

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INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center based in Washington, D.C., with supporters in all 50 states, including California and Nevada.[1] WLF regularly appears in legal proceedings before federal and State courts to defend the principles of free enterprise and limited government. WLF has appeared as *amicus curiae* before this and other federal courts in cases involving Fifth Amendment regulatory takings claims. *See, e.g.*, *Palazzolo v. Rhode Island*, 553 U.S. ____ (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

WLF is concerned that states not be permitted to circumvent Takings Clause constraints by characterizing their land use regulations as temporary in nature. *Any* land use regulation can be characterized as temporary, in the sense that there is always the possibility that the regulation will be lifted at some future date. Thus, WLF strongly believes that the approach adopted by the court below - whereby a land-use regulation labeled "temporary" cannot give rise to categorical takings analysis - is a recipe for emasculating the Takings Clause.

WLF submits this brief in support of Petitioners with the written consent of all parties. The written consents are on file with the Clerk of the Court.

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[1] Pursuant to S. Ct. R. 37.6, WLF hereby affirms that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than WLF, its counsel, and their offices, contributed monetarily to the preparation or submission of this brief.

STATEMENT OF THE CASE

The Petitioners are individuals (or their heirs) who purchased home lots in partially developed residential neighborhoods around Lake Tahoe in the 1970s or earlier. Subsequent to their purchase, Respondents California and Nevada formed Respondent Tahoe Regional Planning Agency ("TRPA") with the charter to adopt land use regulations that would protect the scenic beauty of Lake Tahoe. Petition Appendix ("Pet. App.") 6. Pursuant to its enabling legislation, on August 24, 1981, Respondent TRPA issued a temporary ordinance prohibiting residential development of Petitioners' properties. Pet. App. 7. Development was prohibited in order to limit runoff into the lake, which was responsible for the decreasing clarity of the lake. Pet. App. 62-64. This ordinance did not affect existing homes. The enabling legislation provided that the interim regulations would end upon adoption of a permanent plan accomplishing the same goals. Pet. App. 7, 68.

The prohibition on development adopted in 1981 was extended (both through formal resolution of the TRPA board and by informal staff action, Pet. App. 75) and eventually replaced with another temporary ordinance prohibiting development, which was also extended. Pet. App. 8. Eventually, the temporary ordinances came to an end on April 26, 1984, two years and eight months after they began. *Id*. They were succeeded by permanent regulations based on the final plan, which prohibited all development on Petitioners' properties. Pet. App. 9. None of these regulations required that any existing residences or other habitable structures be demolished or otherwise curtailed.

Over the years Petitioners have continued to pay real estate taxes but have been and are still completely denied the use of their properties. Their sacrifice has not been in vain, however. The beauty and clarity of Lake Tahoe have been preserved, *see* Pet. App. at 59-61, vacationers flock to the homes, hotels and casinos on its shores, and real estate values for developed residential property by the Lake have soared. *See generally* United States Geological Survey, Lake Tahoe Data Clearinghouse, http://tahoe.usgs.gov/ (last visited August 27, 2001); www.tahoe.com (last visited August 27, 2001).

In an opinion written by Judge Reinhardt, the United States Court of Appeals for the Ninth Circuit held that the initial two-year and eight-month ban on development in this case did not constitute a taking because the property theoretically retained a residual value following the expiration of the ban. Pet. App. 37-38.

SUMMARY OF ARGUMENT

From the landowner's perspective, it little matters whether the government puts a fence around his land with a "Do Not Enter" sign on it, or takes title to a conservation easement over his property, or enacts regulations that require him to maintain his property as open land. The result in each case is the same – the landowner is deprived of a fundamental aspect of property ownership, the right to beneficial use of his land. Nor, from the landowner's perspective, is there any difference if the fence comes down, or title reverts, or the regulations expire after a few years. In any such case the landowner has suffered a loss from the

forced draft of his land into government service for which he deserves just compensation.

Requiring governments to pay just compensation for "temporary" takings will not in any way interfere with legitimate land use planning. Many alternatives short of complete prohibitions on use are available to slow down development where extensive changes to a zoning regime or regional plan are thought to be desirable or necessary. Moreover, complete prohibitions on use are readily distinguishable from the "normal delays" entailed in waiting for agencies to process applications for various kinds of land-use permits and approvals, which would not, absent bad faith or extraordinary delay, implicate the Takings Clause.

ARGUMENT

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1033 (1992), Justice Kennedy wrote in a concurring opinion that petitioner would be entitled to relief if he were deprived by respondent's regulations of the use of his land for an interim period. Justice Kennedy thought this result mandated by the Court's decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), writing that "[i]t is well established that temporary takings are as protected by the Constitution as are permanent ones." 505 U.S. at 1033. Unhappy with these precedents, the court below adopted a crabbed interpretation of *Lucas* and *First English*, limiting them to cases where regulations intended to be permanent are later repealed or invalidated. Ignoring this Court's admonition that "the Takings Clause of the Fifth Amendment [is] as much a part of the Bill of Rights as the First

Amendment or the Fourth Amendment," *Dolan v. Tigard*, 512 U.S. 374, 392 (1994), the Court of Appeals's construction relegates the Takings Clause to the status of a "poor relation," *id.*, and must be rejected.

I. GOVERNMENT REGULATIONS THAT SEVERELY IMPACT FUNDAMENTAL PROPERTY RIGHTS ARE COMPENSABLE TAKINGS WITHOUT REGARD TO THE DURATION OF THE REGULATION

The Takings Clause of the Fifth Amendment states that "private property [shall not] be taken for public use, without just compensation." Since *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), it has been applied to governmental regulations of land that go "too far." A long line of cases following *Mahon* has established that regulations that severely impact fundamental rights of property ownership must be compensated even if the impact on the total value of the landowner's property is relatively small. This principle applies with full force to regulations that severely impact property rights for a limited period.

To start with, the language of the Fifth Amendment does not say "unless the government only takes the property for a little while." In plain English, the Taking Clause requires just compensation for all takings of private property. This duty applies whether the government action affects all or a portion of the landowner's property and whether it lasts for a long or short time.

Indeed, the very distinction between "temporary" and "permanent" regulatory action, upon which the court below

placed such reliance, Pet. App. 37-38, is completely artificial. "All takings are 'temporary,' in the sense that the government can always change its mind at a later time, and this is true whether the property interest taken is a possessory estate for years of a fee simple acquired through condemnation, or an easement of use by virtue of a regulation." *Hendler v. United States*, 952 F. 2d 1364, 1376 (Fed. Cir. 1991). The government is always free to repeal a "permanent" regulation and to extend indefinitely a "temporary" regulation.[2]

This possibility of a change in regulatory environment accounts for the fact that property may retain some speculative value even after implementation of a "permanent" regulatory scheme that eliminates all commercial use. *See, e.g., Florida Rock Industries v. United States*, 18 F.3d 1560, 1566 (Fed. Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995). However, the existence of some residual value following the termination of the government action, whether scheduled or speculative, does not make the landowner whole.

Moreover, allowing government to avoid the costs of regulatory action by labeling it "temporary" at the very least invites manipulation. It is an unfortunate fact that land use agencies often abuse their powers, *see generally* Cobb, *Land Use Law: Marred by Public Agency Abuse*, 3 Wash. U. J.L. 195, 196-198 (2000), including by the imposition of "severe

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[2] *See also Hendler*, 952 F.2d at 1377 ("If the term 'temporary' has any real world reference in takings jurisprudence, it logically refers to those governmental activities which involve an occupancy that is transient and relatively inconsequential, and thus properly can be viewed as no more than a common law trespass *quare clausum fregit*").

regulations that do not allow development at all or to a small degree." *Id.* at 197. Allowing states or localities to impose temporary prohibitions on development without having to pay the landowner for the loss imposed opens the door to abuse. For agencies that are short on funds, the temptation to preserve open land at no cost by the expedient of stringing together or extending "temporary" moratoria may well prove overwhelming.

Nor is it an answer to say, as the court below said, that a taking might occur "were a temporary moratorium designed to be in force so long as to eliminate all present value of a property's future use." Pet. App. 38. Because undeveloped land has a perpetual lifetime, a "temporary moratorium" would have to be long -- decades long -- in order to "eliminate" the discounted present value of the residual interest following the expiration of the prohibition on use. The effect of the court of appeals's loophole for "temporary" takings would thus be to eviscerate the Takings Clause. Moreover, there is always the possibility that (as here) one "temporary moratorium" might be succeeded by another. Any attempt to fashion an exception for "temporary takings" measured by how much residual value the landowner retains would leave landowners with no practicable means for determining when the aggregate effect of such moratoria tip over into a compensable taking. The consequences of guessing wrong might well result in a failure to file suit within the applicable limitations period. In any event, the hostility with which many courts treat takings claims ensures that any such suit would face great obstacles. *Cf.* Pet. App. 49-56 (holding that statute of limitations bars certain of Petitioners' claims notwithstanding law of the case).

Even if it made sense to consider a separate category of "temporary" takings, there is no plausible distinction between physical occupations and regulatory takings of equal duration. The government's duty to compensate landowners for temporary or partial occupations of land is uncontroversial. Generally speaking, any physical occupation of any portion of a property, no matter how small the portion affected or short-lived the governmental use, or how pressing the government's need, is treated as a taking requiring just compensation under the Fifth Amendment. *See, e.g*, *United States v. Petty Motor Co.*, 327 U.S. 372 (1946) (taking of leaseholds during wartime emergency); *United States v. General Motors Corp.*, 323 U.S. 373 (1945) (taking of portion of a leasehold interest during wartime emergency); *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949) (temporary occupation of private property during wartime emergency). Similarly, it is commonly accepted that temporary easements, *e.g.*, *Wray v. Parsson*, 101 Ohio App.3d 514, 520 (Ct. App. 1995) (in some cases, the value of a temporary easement may exceed the value of the fee); *Beardmore v. Town of Ellington*, 1991 Conn. Super. LEXIS 341 * 6 (1991) (value of a temporary easement is measured in same way as value of partial taking, comparing value of entire parcel before with entire parcel after); *Traendly v. New York*, 51 A.D.2d 489 (N.Y. 1976) (awarding damages for taking of temporary easement), *aff'd*, 43 N.Y.2d 804 (1977), as well as occupations of a portion of a parcel, *see Florida Rock Industries*, 18 F.3d at 1569, require just compensation.

Here, what TRPA imposed over Petitioners' properties was in effect a conservation easement of unlimited scope but limited duration. Conservation easements are widely

recognized interests in land in which the property owner promises for the benefit of a private party or the government not to develop the land. *See*, *e.g.*, National Lands Trust, Inc., *The Conservation Easement: A Flexible Tool For Preserving Family Lands*, http://www.natlands.org/library/consease.html (last visited August 23, 2001); Landtrust, *What is a Conservation Easement*, http://www.landtrust.org/ltc/easement.htm (last visited August 23, 2001); Thomas, *What You Need to Know About Conservation Easements*, http://www.nodarbyrefuge.org/conservation_easements.htm (last visited August 23, 2001).

A conservation easement can prohibit any and all development or preserve some rights for the landowner (such as the right to grow crops or maintain existing residences), *see The Conservation Easement: A Flexible Tool For Preserving Family Lands*, *supra*, at 1, and may be for limited or unlimited duration. Uniform Conservation Easement Act § 2(c) (1981). Conservation easements represent valuable interests, *e.g.*, Environmental News Network, *Maine Celebrates Largest U.S. Conservation Easement*, April 4, 2001, http://www.enn.com/enn-news-archive/2001/04/0402001/maine_42776.asp (last visited August 23, 2001) ($28 million paid for conservation easement), and if granted to a charitable organization in perpetuity may entitle the donor to a tax deduction for the value of the interest, *see The Conservation Easement: A Flexible Tool For Preserving Family Lands*, *supra*, at 3.

There is no logical basis to distinguish between a temporary easement to facilitate construction of a road, *e.g.*, *Parsson*, 101 Ohio App.3d at 520, for which compensation is unequivocally required, and a temporary conservation

easement to protect the environment, as TRPA imposed here. In each case the landowner's land is impressed into public service and the landowner is deprived of the use of the land for a limited period. The presence of physical occupation in the one case and its absence in the other does not matter to the landowner, for from his point of view, "it matters little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state." *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting).

II. RESPONDENTS' PROHIBITION OF ANY BENEFICIAL USE OF PETITIONERS' LAND CONSTITUTED A TAKING WITHIN THE MEANING OF *LUCAS*

Lucas announced a categorical rule for certain types of regulatory takings, holding that regulations that deny the property owner "all economically beneficial or productive use of his land" constitute compensable takings under the Fifth Amendment without further inquiry into the public purpose of the regulation or the impact on the landowner. 505 U.S. at 1015 & 1019. The regulations at issue here fall squarely within the ambit of *Lucas*.

In *Lucas*, the State of South Carolina had enacted legislation that prohibited any construction by petitioner on his beachfront property. The Court conceded the valid purposes of the legislation but, addressing the question left open by *First English*, held that such a prohibition on any economically viable use of property constituted a taking unless such construction could have been prohibited under

the State's common law of nuisance. 505 U.S. at 1027-1031.

The Court in *Lucas* gave four reasons for this rule. First, it suggested that "total deprivation of beneficial use is, from the landowner's perspective, the equivalent of a physical appropriation," 505 U.S. at 1017, even though the landowner retains other indicia of property ownership such as the right to exclude others from the property, the right to transfer the property, and the right to use the property in non-economic ways. In the Court's view, these other elements of ownership paled before the ability to use the property for economic purposes, citing Coke's view that "'what is property by the profits thereof[?]'" *Id.*

Second, the Court stated that the potential for reciprocal benefits provides a justification for many land-use regulations that adversely affect an owner's ability to use his property, *see, e.g.*, *Mahon*, 260 U.S. at 415; *cf. Martin v. District of Columbia*, 205 U.S. 135 (1907)(Holmes, J.) (cost of widening alley cannot be imposed solely on adjoining landowners where such cost greatly exceeds the benefit conferred by the widening), but a complete prohibition on use makes it unlikely that the landowner would ever receive any reciprocal benefits from the regulations. 505 U.S. at 1017-1018.

Third, the Court reasoned that the rarity of complete prohibitions on use rendered inapplicable the concern that Government would grind to a halt if it had to pay for every regulation. *Id.* at 1018.

Last, the Court expressed concern that regulations requiring that land be left in its natural state "carry with them

a heightened risk that private property is being pressed into some form of public service under the guise of mitigating harm." *Id.* The Court cited with approval Justice Brennan's dissent in *San Diego Gas*, 450 U.S. at 652, for the proposition that "[f]rom the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation."

The *Lucas* Court acknowledged that regulations that prohibit a nuisance would not constitute a taking, nor would other limitations that "inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id.* at 1029. However, the Court expressed skepticism that the law of nuisance would ever support prohibition of the "'essential use'" of land, *id.* at 1031 (citing *Curtin v. Benson*, 222 U.S. 78, 86 (1911)), in this case, the construction of houses or other productive improvements.

Here, TRPA's regulations – requiring that Petitioners' land be kept in its natural state in order to protect Lake Tahoe – fit precisely *Lucas*'s concern with "private property being pressed into some form of public service under the guise of mitigating harm." There is no plausible claim here that the regulations sought to prevent Petitioners from engaging in noxious or harmful activities, and the District Court did not so find. Were it otherwise, were human habitation on the shores of Lake Tahoe in fact a nuisance, the regulations would have required some mitigation of similar harms flowing from already existent houses and other buildings near Lake Tahoe. This did not happen. Instead, these regulations were intended to preserve (and happily

succeeded in preserving) the values of homeowners and commercial operators who built before the regulators arrived as well as the interests of the greater public in the scenic beauty and clarity of Lake Tahoe.

In a similar vein, it is obvious that the Petitioners did not derive any "reciprocal benefit" from these regulations, *Lucas*, 505 U.S. at 1017-1018, apart from the joy of involuntarily contributing to the success of the tourist industry in the Lake Tahoe Basin. In *Mahon*, Justice Holmes distinguished a prior case that had upheld a requirement that a pillar of coal be left along the line of an adjoining property as based on the need to preserve the safety of the miners in both the instant and adjoining mines; the regulation thus "secured an average reciprocity of advantage." 260 U.S. at 415. Some degree of mutual benefit, which need not be precisely measured, is required to justify burdensome regulations which would otherwise "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). It is this expectation of widely shared benefits that justifies zoning ordinances that may in fact burden some landowners more than others. *See Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

In the instant case, speculation that Petitioners might have benefitted from the moratorium following its expiration, *e.g.*, Note, *Lake Tahoe's Temporary Moratorium: Why a Stitch in Time Should Not Define the Property Interest in a Takings Claim*, 28 Ecology L. Q. 399, 418 (2001), is unjustified particularly in view of the fact that the initial prohibition on development was authorized by legislation that

contemplated permanent restrictions, which were in fact adopted. Pet. App. 7, 9, & 68. In any event it is surely stretching the notion of reciprocal benefits – which may justify residential zoning or setback and height restrictions – too far to say that a landowner compelled to maintain his property as open space for a substantial period of time might somehow benefit from a similar imposition on other landowners.

Nor is there any merit to the argument that Petitioners did not suffer a taking under the categorical rule of *Lucas* because they retained some theoretical residual value in their land, Pet. App. 38-39. Nothing in *Lucas* requires the complete and permanent deprivation of all strands of one's rights in property in order for a regulation to be deemed a categorical taking. The *Lucas* Court relied in part on *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), where regulations requiring apartment owners to provide access for television cable companies to install cable facilities were held to constitute a taking under the Fifth Amendment. The Court described *Loretto* as involving regulations that "compel the property owner to suffer a physical 'invasion' of his property" which was compensable even though the intrusion was "minute." 505 U.S. at 1015. Here, the impact of TRPA's regulations on Petitioners' property rights – the complete denial of any commercial or residential use of the land for a substantial period of time – was far more than "minute."[3]

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[3] The appeals court's reliance on *Andrus v. Allard*, 444 U.S. 51 (1979), was misplaced. *See* Pet. App. 23-24. In *Andrus*, the Court rejected a takings claim brought by an owner of eagle feathers following (continued...)

Indeed, *Lucas* made clear that the landowner would have been entitled to compensation even if South Carolina land-use regulations had not been deemed permanent. South Carolina argued that the landowner's takings claim was not ripe because in 1990 (during the course of litigation) the regulations had been amended in a manner that might have permitted some development; South Carolina argued that the claim would not be ripe unless and until the landowner sought and was denied permission to build under the 1990 regulations. 505 U.S. at 1011. The Court rejected that argument. Citing *First English,* the Court said that regardless whether the landowner might still be permitted to develop his property under the 1990 regulations, his claims nonetheless were ripe because he would still be permitted to seek compensation for having been temporarily denied all use of his property during the 1988-1990 period. *Id.* at 1011-12.

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[3](...continued)
adoption of federal regulations prohibiting feather sales. The appeals court cited *Andrus* for the proposition that this Court has "rejected the conceptual disaggregation of property rights" as the basis for Takings Clause claims; the court asserted that government destruction of one strand of the bundle of rights that constitutes "property" does not constitute a categorical taking if other strands remain. Pet. App. 24. Not only does the appeals court's reading of *Andrus* fail to explain *Loretto,* it is directly contradicted by *Lucas*. *Lucas* distinguished *Andrus* on the ground that government regulation of personal property (such as eagle feathers) is subject to less exacting Takings Clause scrutiny than is regulation of real property. The Court explained that because of "the State's high degree of control over commercial dealings," an owner of personal property - in sharp contrast to owners of real property - "ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale)." 505 U.S. at 927-28.

Similarly, Petitioners' categorical takings claims are in no way undermined simply because the challenged land-use regulations were nominally "temporary" in nature.

III. THE COURT OF APPEALS ERRED IN CONCLUDING THAT *FIRST ENGLISH* IS LIMITED TO REGULATIONS INTENDED TO BE PERMANENT AND LATER WITHDRAWN OR INVALIDATED

The question presented in *First English* was "whether the Just Compensation Clause requires the government to pay for 'temporary' regulatory takings." 482 U.S. at 313. Although the Court stated its holding in narrow terms, nothing in the Court's reasoning supports the lower court's conclusion that *First English* is limited to regulations that are by their terms permanent and which are later rescinded or struck down. On the contrary, the better reading of *First English* is that just compensation is required for any "temporary" regulation that completely deprives a landowner of the use of his property.

In *First English*, the County of Los Angeles adopted an "Interim Ordinance" prohibiting construction on a portion of Angeles National Forest threatened by flooding. The interim ordinance was adopted in order to preserve "public health and safety," 482 U.S. at 307, and prevented petitioner from reconstructing a camp that had been destroyed by the flood. The petitioner sued the County in inverse condemnation, claiming that the ordinance denied it all use of its property. The state court held that whether or not a "taking" had occurred, under the ruling of the California Supreme Court set forth in *Agins v. Tiburon*, 24 Cal.3d 266 (1979), *aff'd on*

other grounds, 447 U.S. 255 (1980), petitioner could not recover any damages until the ordinance "has been held excessive in an action for declaratory relief or a writ of mandamus and the government has nevertheless decided to continue the regulation in effect." 482 U.S. at 308-309; *see also id.* at 311-312. This Court noted probable jurisdiction.

After confirming that the government retains a whole range of options to avoid having to pay for the full value of the property once a court has determined that regulations have effected a taking, this Court reversed the state court's holding: "[W]here the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *Id.*

The *First English* Court relied in large part on analogy to the cases where the government has temporarily occupied or used private property, reasoning "that 'temporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." 482 U.S. at 318. Accordingly, just as the government may be required to compensate property owners when it takes leasehold interests of relatively short duration, so must it compensate property owners when by regulation it prevents all use for a limited period. The Court rejected Justice Stevens's argument (and no other Justice joined in this part of his dissent) that it was improper in a regulatory takings case to consider the impact of the regulations on only a portion of the entire fee simple interest, in this case a time-limited period of use, without considering the rights left to the

landowner for future use. 482 U.S. at 330-333 (Stevens, J., dissenting).

Although the holding was narrowly stated, the *First English* Court did not address only regulations intended to be permanent but subsequently withdrawn or invalidated; indeed, the regulation at issue there was itself only an "Interim Ordinance." 482 U.S. at 307. By making clear that the government could not avoid liability for regulations that take "all use of the property" by repealing or otherwise ending the applicability of the regulation, *id.* at 321, the Court did not imply that government regulations that were the equivalent of physical occupation were exempt from the Takings Clause if limited in duration. *See also Lucas*, 505 U.S. at 1014 n.3 (upholding claim for just compensation based on complaint which sought damages for "temporary taking" of property from time of enactment of legislation through trial).

IV. UPHOLDING PETITIONERS' CLAIMS TO JUST COMPENSATION WILL IN NO WAY JEOPARDIZE THE ABILITY OF STATES AND MUNICIPALITIES TO ENGAGE IN SENSIBLE LAND USE PLANNING

The heart of the lower court's decision was its fear that upholding Petitioners' constitutional claims here might jeopardize the ability of states and municipalities to engage in sound land use regulation: "[T]he widespread invalidation of temporary planning moratoria would deprive state and local governments of an important land-use planning tool with a well-established tradition." Pet. App. 27. This argument assumes erroneously that municipalities need to be

able to prohibit any development of undeveloped land in order to "preserve the status quo during the planning process." *Id.* In fact there are many kinds of interim development ordinances available to slow down development and "prevent land development that would conflict in any way with the permanent legal controls that will ultimately be adopted." Garvin & Leitner, *Drafting Interim Development Ordinances: Creating Time to Plan*, Land Use Law and Zoning Digest, June 1996, at 3. For example, municipalities can temporarily restrict the rezoning of new land or issuance of new subdivision approvals, *id.*, or decline to issue permits for "tear-downs" and construction of new, larger houses. Such moratoria would continue to be evaluated under the *ad hoc* balancing test of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978); *but see* Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 Stan. L. Rev. 1369, 1388 (1993). Prohibitions on all use of undeveloped land are only one subset of the types of moratoria in use and present issues dramatically different from land use regulations that permit some beneficial use.

More importantly, requiring just compensation for the imposition of a complete prohibition on use does not "invalidate" anything. Any state or local government that seeks to preserve open space through the imposition of a conservation easement (however styled) is free to do so, for any period that it desires; however, it cannot constitutionally force the landowner to bear solely a burden that benefits that entire community.

Nor would a requirement that agencies pay just compensation when they impose "temporary" moratoria on

all productive use of land have any impact on "good-faith planning activities." *Agins v. City of Tiburon*, 447 U.S. 255, 263 n.9 (1980). While extraordinary or bad-faith delays in governmental decision making could give rise to a taking claim, the normal delays in processing applications for permits or variances are "'incidents of ownership [that] cannot be considered as a 'taking' in the constitutional sense.'" *Id.* The intentional imposition of draconian regulations, even if limited in duration, cannot be confused with the day-to-day, good faith activities of zoning boards and planning agencies.

Normal delays in processing a development application are not compensable because an estate in real property has never been understood to include the right to develop the property without prior government review; such rights are "not part of [the landowner's] title to begin with." *Lucas*, 505 U.S. at 1027. The Court's takings jurisprudence "has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the bundle of rights that they acquire when they obtain title to property." *Id.* Because it is well understood by property owners that regulatory authorities need a reasonable amount of time to ensure that development plans conform with existing, valid zoning regulations, the Takings Clause does not require compensation for losses caused by such delays. But should a jurisdiction desire to delay development plans that conform fully to existing zoning restrictions, basic fairness requires that the cost of those delays be borne by the citizenry as a whole rather than by the individual property owner.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

Douglas B. Levene
c/o Philip Morris Capital Corp.
Legal Department
225 High Ridge Road
Suite 300
Stamford, CT 06905
(914) 335-8347

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

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IN THE

Supreme Court of the United States

TAHOE-SIERRA PRESERVATION COUNCIL, INC.,
Petitioner,

v.

TAHOE REGIONAL PLANNING AGENCY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF THE AMERICAN FARM BUREAU FEDERATION, CALIFORNIA FARM BUREAU FEDERATION AND THE NEVADA FARM BUREAU FEDERATION IN SUPPORT OF PETITIONER

NANCY MCDONOUGH
General Counsel
HENRY E. RODEGERDTS
CALIFORNIA FARM BUREAU
2300 River Plaza Drive
Sacramento, CA 95833
(916) 561-5500

JOHN J. RADEMACHER
Counsel of Record
MICHAEL J. STIENTJES
AMERICAN FARM BUREAU FEDERATION
225 Touhy Avenue
Park Ridge, IL 60068
(847) 685-8600

Counsel for Amici Curiae

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IN THE

Supreme Court of the United States

No. 00-1167

TAHOE-SIERRA PRESERVATION COUNCIL, INC.,
Petitioner,

v.

TAHOE REGIONAL PLANNING AGENCY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICI CURIAE* OF THE AMERICAN FARM BUREAU FEDERATION, CALIFORNIA FARM BUREAU FEDERATION AND THE NEVADA FARM BUREAU FEDERATION IN SUPPORT OF PETITIONER

With the joint written consent of the parties given and filed with the Clerk of the Court, the American Farm Bureau Federation, California Farm Bureau Federation, and the Nevada Farm Bureau Federation respectfully submit this brief as *amici curiae*.[1]

---

[1] Counsel for *amici curiae* have authored this brief in whole and no other person or entity other than *amici*, their members or counsel have made a monetary contribution to the preparation or submissions of the brief.

INTEREST OF THE AMICI CURIAE

The American Farm Bureau Federation (AFBF) is a voluntary general farm organization formed in 1919 and organized in 1920 under the General Not-For-Profit Corporation Act of the State of Illinois. AFBF was founded to protect, promote, and represent the business, economic, social and educational interests of American farmers and ranchers. AFBF has member organizations in all 50 states and Puerto Rico, representing more than 5 million member families. *Amici* California Farm Bureau Federation and Nevada Farm Bureau Federation are constituent members of AFBF, representing the interests of farmers and ranchers in the States of California and Nevada, where the property at issue in this case is located.

Amici American Farm Bureau Federation, California Farm Bureau Federation and the Nevada Farm Bureau Federation have a direct stake in the outcome of this case. The decision of the U.S. Circuit Court for the Ninth Circuit in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 216 F.3d 764 (9th Cir. 2000) ignores, if not attempts to reverse,[2] this Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), which held that a temporary regulatory taking of private property requires compensation under the Fifth Amendment Takings Clause.

Amici's farmer and rancher members own and lease significant amounts of land on which they depend for their livelihoods and upon which all Americans rely for food and

[2] A Petition for Rehearing was denied along with a suggestion for Rehearing En Banc on October 20, 2000. Five Circuit Judges dissented on the grounds that the panel opinion was in direct conflict with the decision of this Court in *First English.* As the dissent authored by Judge Kozinski notes, "The panel does not like the Supreme Court's Takings Clause jurisprudence very much, so it reverses *First English* . . . ." 228 F.3d at 999.

other basic necessities. Because that land is subject to increasingly onerous regulation from all levels of government that impair the ability to farm, and, in some instances, eliminate that ability altogether, AFBF and its members are vitally interested in the legal rules establishing the availability of compensation under the Takings Clause. Accordingly, AFBF, often together with one or more of its member state Farm Bureaus, has participated as *amicus* in this Court in support of landowners in takings cases such as *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), *City of Monterey v. Del Monte Dunes, Ltd*, 526 U.S. 687 (1999), and *Palazzolo v. Rhode Island*, 533 U.S. ___ (2001), as well as in cases concerning the permissible scope of land use regulation such as *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), and *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001).

In recent times, federal, state and local governments experienced monumental budget problems. In the face of diminishing program funds, federal, state and local regulators began to satisfy their public purpose land needs, particularly those for environmental protection and restoration, through regulatory controls, procedures, and other means that attempt to avoid compensatory expenditures. The remote and sparsely developed lands of farmers and ranchers have been particularly vulnerable to such taking efforts. The creative efforts of government regulators to restrict farmers and ranchers in the economically viable use of their land without just compensation continues today, particularly in the areas of wetland preservation and endangered species habitat protection.

American farmers and ranchers need the protection of the Fifth Amendment and the federal courts if they are to find economically feasible ways to use their land and remain in

the agricultural business. They began to sense some relief and assurance of their ability to remain viable when this Court, in *Dolan*, sent a strong signal that the constitutional tide was turning in favor of private property rights. As Chief Justice Rehnquist declared in the majority opinion, "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of a poor relation." 512 U.S. at 2320. *Dolan* followed a recent trend of rulings strengthening the position of property owners under the takings clause of the Fifth Amendment in the face of increased government regulation, particularly in the area of environmental protection and restoration. That trend began in 1987 with this Court's decision in *First English*.

Amici AFBF, California Farm Bureau Federation and Nevada Farm Bureau Federation have a vital interest in this Court reversing the decision of the Ninth Circuit and affirming that *all* takings—permanent or temporary, require compensation.

BACKGROUND

This case involves approximately 450 owners of residentially zoned and improved lots near Lake Tahoe who sued for compensation when the Tahoe Regional Planning Agency (TRPA), through a rolling series of moratoriums and ordinances, blocked them from building homes on their lands as part of an regulatory scheme to protect the water quality of the lake. At issue on this appeal is a moratorium on development that required the landowners to leave their land idle for almost three years.[3] After a bench trial, the district

[3] The moratorium at issue is but one in a series of rolling moratoriums and ordinances over the last twenty years that still block the landowner-petitioners from building on their properties; the same absolute prohibitions on development that this Court reviewed in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997).

court, following the takings jurisprudence of this Court set forth in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), held that the landowners were entitled to compensation for the three year period. The Ninth Circuit reversed, holding that a planning moratorium or temporary regulation can not result in a compensable taking. The Ninth Circuit refused to follow the decision of the majority of this Court in *First English*. As noted by Judge Kozinski in his dissent from the order denying rehearing, the Ninth Circuit chose instead to rewrite Supreme Court precedent. 228 F.3d 998, at 999.

ARGUMENT

Amici's position in this appeal is straightforward and the same as the landowner-petitioners. In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), this Court held that a taking occurs when a land use regulation prevents all economically beneficial or productive use of property. In *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), this Court held that there is no difference between a temporary taking and a permanent taking. Seemingly, this Court could not have made itself more clear on the matter that the constitutional guarantees of the Fifth Amendment Takings Clause protect against all uncompensated takings—even where the public use behind the regulation is for environmental protection and is temporary.

For the framers of our Constitution, private property supplied the "clear, compelling, even defining instance of the limits that private rights place on legitimate government." J. Nedelsky, *Private Property and the Limits of American Constitutionalism 9* (1990). The Framers understood the protection of property rights—rights in land in particular—as "the first object of government." *The Federalist No. 10*, at 78 (James Madison) (C. Rossiter ed., 1961).

The Takings Clause lies at the heart of the constitutional scheme to protect private property rights from the grasp of transient political majorities; it was carefully crafted "to bar Government from forcing some people alone to bear burdens which, in all fairness, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Although the Constitution grants government the power to deprive a person of property for a public purpose, the exercise of that power is strictly conditioned upon the payment of just compensation.

To permit governments to deprive private citizens of their property without compensation simply to "advance legitimate state interests" would strip the Takings Clause of its central purpose of preventing redistribution of private property by transient political majorities. It is indisputable that "such a justification can be formulated in practically every case." *Lucas*, 505 U.S. 1003, 1025 n. 12 (1992); see also *Keyston Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 513 (1987) (Rehnquist, C.J., dissenting) ("nearly every action the government takes can be characterized as preventing some grave public harm"). As a practical matter, scrutiny of government action to see if it is rationally related to a legitimate state interest is tantamount to no scrutiny at all. Justice Holmes warned of this result in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922):

> When th[e] seemingly absolute protection [of the Just Compensation Clause] is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

The text, history and central constitutional role of the Takings Clause demand much more exacting scrutiny of land-use regulations. That provision unambiguously states that "private property [shall not] be taken for public use, without just compensation." For the common good, government may deprive a person of property, but only upon payment of just compensation. To hold that the requirement of just compensation does not apply where a taking serves a legitimate public purpose would effectively repeal the Takings Clause, for that Clause presumes that the government is taking property "for a public purpose."

The history of the Takings Clause confirms that it is suppose to have more teeth. The payment of compensation when government took property for the common good was "a principle of the common law * * * of immemorial usage" (W. Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 533, 583 (1972), and continued "protection of private property was a nearly unanimous intention among the founding generation." M McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 Cal. L. Rev. 267, 270 (1988). See generally J. Story, *Commentaries on the Constitution of the United States* 510-511 (R. Rotunda & J. Nowak eds. 1987). There is no indication that the Framers thought a broad swathe cut through the middle of this principle entitled government to take property without compensation where it could conjure up some arguments that the exaction was "reasonable." To the contrary, the Framers regarded protection of the individual property rights as a central goal of government. "Government," wrote James Madison, "is instituted no less for the protection of the property than of the persons of individuals." *The Federalist* No 54, at 339 (C. Rossiter ed. 1961).

The Takings Clause disciplines government by forcing it to weigh the benefits to the community of depriving a person of his property against the constitutionally mandated compensation that would have to be paid for the taking. Property can always be taken for the common good, provided the government is willing to pay the bill. Hence the distrust

of government underlying our constitutional structure of separated powers and checks and balances and our Bill of Rights can clearly be seen at work in the Takings Clause, which imposes a taxpayer burden to check excessive zeal of regulatory bodies. The takings clause, moreover, requires the government treat individuals with dignity by ensuring that, if government takes their property, it compensates them for that intrusion.

Finding "'no warrant in the laws or practices of our ancestors'" for government "'authority [to] inva[de] private right under the pretext of the public good'" (*United States v. Lynah*, 188 U.S. 445, 470 (1903), this Court has long recognized that the Takings Clause is designed to shield individual rights from government action that would convert one person's property to community use. See *Armstrong*, 364 U.S. at 49; *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893) (the Clause "prevents the public from loading upon one individual more than his just share of the burdens of government"). The teachings of the Takings Clause is that where public benefits are achieved by depriving individuals of property, the costs "must be borne by all [of a community's] taxpayers [and not] imposed entirely on the owners of individual properties." *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 139 (1978) (Rehnquist, J., dissenting). The cardinal principle that should guide its interpretation is that government may not sacrifice the interests of some to benefit others: "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal*, 2600 U.S. at 416; see also *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841-842 (1987).

THE FIFTH AMENDMENT GUARANTEES THAT ALL TAKINGS, REGARDLESS OF THEIR LENGTH, WILL BE COMPENSATED

In 1987 this Court issued its landmark decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). The Court held that the Fifth Amendment means exactly what it says: the government must compensate the owners of private property taken for public purposes. The Court concluded that the Fifth Amendment dealt with all takings, regulatory as well as physical, and, critical to this case, temporary as well as permanent.

Applying *First English,* the district court in *Tahoe-Sierra* found there to be a compensable taking. On appeal, the Ninth Circuit, chose to ignore this Court's *First English* pronouncements. The Ninth Circuit ruled that a temporary regulation can never be a regulatory taking. Rather than dealing with the landowners' constitutional guarantees, the Ninth Circuit engaged in a rescue operation to shield regulators from shouldering the financial consequences of their actions. It actually saw the landowners' pursuit of their constitutional guarantees under the Takings Clause as an effort to "penalize" the regulators and the regulatory process. The Ninth Circuit viewed the landowners as those who would turn the Takings Clause "into a weapon to be used indiscriminately to penalize local communities for attempting to protect the public interest." 216 F.3d at 782.

But the Takings Clause and takings litigation are not about penalizing regulators. Instead, the Takings Clause disciplines regulators by forcing them to weigh the benefits to the community of depriving a person of his property against the constitutionally mandated compensation that would have to be paid for the taking. Takings litigation accepts the general validity of the regulation, it does not seek to strike it down. Takings litigation is only another instance of "protect[ing] the public interest" by requiring obedience to the Constitution.

As Justice Brennan put it, "After all, if a policeman must know the Constitution, then why not a planner?" See *San Diego Gas*, 450 U.S. 621, 661, n.26 (1981) (dissenting).

Most land-use regulations do not result in a taking and do not call for compensation. A regulation effects a taking only when it denies an owner of "all economically beneficial or productive use of land." *Lucas,* 505 U.S. 1003, 1015 (1992). As indicated by Judge Kozinski in his dissent, "The only difference between this case and *Lucas* is that the regulation here had a finite duration . . . So the question is whether there is something special about a finite moratorium that relieves the government from its duty to compensate." *Tahoe-Sierra*, 228 F.3d 998, 999-1000. And, of course, this Court had answered that question in *First English*, when it said that "'temporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." *First English*, 482 U.S. 304, 318 (1987).

Thus, the Ninth Circuit got it wrong in *Tahoe-Sierra.* The Fifth Amendment means exactly what it says: "private property [shall not] be taken for public use, without just compensation." That means all takings, regardless of their length, purpose, or manner of implementation.

THE NINTH CIRCUIT'S DECISION HAS SEVERE, WIDE REACHING IMPLICATIONS FOR LANDOWNERS

This Court's landmark decision in *First English* concluded that the Fifth Amendment not only dealt with physical takings, but also regulatory takings, and, critical to *amici*, temporary as well as permanent regulatory takings, including planning moratoriums. The matter of temporary takings is of great practical importance to landowners, farmers and ranchers especially, because many takings are only temporary in nature. For example, the wetlands restrictions that were set

aside by this Court in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) were "temporary" since they have now been struck down; development moratoria are commonplace while rezoning issues are being considered by government; long delays in making decisions on permit applications, such as Clean Water Act Section 404 permits to fill wetlands, are, in effect, "temporary" restrictions on the use of land; and Endangered Species Act habitat restrictions may be "temporary" to the extent that a protected species of plant or animal continues to exist on private property thus preventing its use for any purpose. If federal, state and local governments can freely restrict land use without paying compensation, so long as the regulatory restriction is "temporary," landowners, especially farmers and ranchers, can expect to see a lot more use of planning delays, rolling moratoria, and "temporary " regulations impairing their economical viable use of their lands.

CONCLUSION

For the foregoing reasons, the decision of the U.S. Court of Appeals for the Ninth Circuit should be reversed.

Respectfully Submitted,

NANCY MCDONOUGH
General Counsel
HEBRY E. RODEGERDTS
CALIFORNIA FARM BUREAU
2300 River Plaza Drive
Sacramento, CA 95833
(916) 561-5500

JOHN J. RADEMACHER
Counsel of Record
MICHAEL J. STIENTJES
AMERICAN FARM BUREAU FEDERATION
225 Touhy Avenue
Park Ridge, IL 60068
(847) 685-8600

Counsel for Amici Curiae

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Respondents.

On a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONERS

*CHRISTOPHER G. SENIOR
DAVID CRUMP
NATIONAL ASSOCIATION OF HOME BUILDERS
1201 15TH STREET, NW
WASHINGTON, DC 20005
(202) 266-8200

Attorneys for Amicus Curiae
**Counsel of Record*

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INTERESTS OF THE AMICUS CURIAE

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this brief as amicus curiae in support of the petitioners. Letters of consent have been filed with the Clerk of the Court.[1]

NAHB represents over 203,000 builder and associate members throughout the United States. Its members include not only people and firms that construct and supply single family homes, but also apartment, condominium, multi-family, commercial and industrial builders, land developers, and remodelers. It is the voice of the American shelter industry. NAHB, therefore, is concerned with any judicial decision that calls into question the remedies available to its members under the U.S. Constitution, particularly as here when a lower court has so clearly misinterpreted a decision of the U.S. Supreme Court.

NAHB has been before the Court as an amicus curiae or as "of counsel" to the landowner in a number of cases involving the rights of property owners and the remedies available to them when their rights are interfered with. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980), *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981), *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986), *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), *Yee v. City of Escondido*, 503 U.S. 519 (1992), *Lucas v. South Carolina Coastal Council*, 505 U.S.

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[1] Pursuant to Rule 37.6 of this Court, amicus states that its counsel authorized this brief and amicus paid for it. This brief was not written in whole or part by counsel for a party, and no one other than amicus made a monetary contribution to its preparation.

1003 (1992), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), and *Palazzolo v. Rhode Island*, 533 U.S. ---, 121 S.Ct. 2448 (2001).

SUMMARY OF ARGUMENT

By excluding governmentally imposed building moratoria from review as takings of property, the U.S. Court of Appeals for the Ninth Circuit has misread this Court's opinion in *First English* and stripped property owners of their right to petition the courts for redress for what is unquestionably a governmental action which blocks the full and fair exercise of the rights of property ownership. By looking at governmental intent in adopting moratoria rather than the effect such regulatory acts have on property, the Ninth Circuit further misapplied well-settled takings law precedent.

This Court must not only reverse the erroneous decision below, but should also provide a clear analytical framework for all courts to utilize when analyzing moratoria as temporary takings. This analysis should draw upon this Court's prior takings jurisprudence, including precedent on distinct investment-backed expectations. Such an analysis should use these expectations as both a threshold test and, more comprehensively, in determining the actual amount of just compensation owed a property owner. This two-stage review would help end the confusion which leads too many courts to confuse the amount of just compensation owed with the existence of the right to just compensation itself, a problem which is particularly acute when analyzing compensation due as the result of moratoria.

ARGUMENT

I. MORATORIA SHOULD BE ANALYZED AS TAKINGS UNDER THE CONSTITUTION, IN RECOGNITION OF THE FACT THAT THEY HAVE THE SAME EFFECT ON AS ANY OTHER GOVERNMENTAL REGULATORY SCHEME WHICH FREEZES OR ELIMINATES ECONOMICALLY VIABLE USE OF PROPERTY.

It is well-settled law that when a governmental regulatory action strips property of its essential value that a taking has occurred requiring the payment of just compensation. In *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), this Court recognized that even time-limited regulations which freeze the use of property may also be compensable takings.

Black's Law Dictionary defines moratoria as "the suspension of a specific activity[2]," and Merriam-Webster's Dictionary of Law adds that they are "a waiting period set by an authority[3]." A planning moratorium in particular is "the most extreme land-use action that a municipality can take because it suspends completely the rights of owners to use their property.[4]" While moratorium come in many variations, they all prohibit the use of property in some manner, for some length of time, and for some at least allegedly legitimate purpose.

But regardless of their form, the economic consequences of moratoria are real, and they are

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[2] *Black's Law Dictionary* 1026 (7th ed. 1999).
[3] *Merriam-Webster's Dictionary of Law* (1996).
[4] George Stankevich, *Moratoria on Development*, The Independent (accessed Sept. 10, 2001) <www.indyeastend.com/lex/052798lx.htm>

permanent. That the actual regulation itself is 'temporary' merely impacts the degree of just compensation owed, not the existence of the injury itself. Some examples of the real economic consequences inflicted on property owners by temporary restrictions include loss of rents[5], loss of commercial lease payments[6], loss of development profits[7], loss of interest paid on secured loans related to property development, loss of access to the property[8], and the payment of real estate taxes and assessments during the period of restriction[9].

Indeed, moratoria may "restrict not only the landowner's ability to develop the property, but also affect selling prospects and any expectations of income producing potential."[10] Moratoria can have serious economic consequences.

Had some form of what was just described carried some other name, it would be hard to imagine how any court would not at least analyze such an exercise of raw governmental power as a taking. Yet, once the label "moratoria" is applied, along with the concept of a "limited duration," courts such as the one below often throw up their hands and declare that takings law simply does not apply. These decisions proceed from fundamental misconceptions of both law and fact.

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[5] Keshbro, Inc., et al. v. City of Miami, et al., 2001 WL 776555 (Fla. 2001)
[6] Woodbury Place Partners v. City of Woodbury, 492 N.W. 2d 258 (Minn. Ct. App. 1993)
[7] Steel v. Cape Corp., 677 A.2d 634 (Md. App. 1996)
[8] Eberle v. Dane County Board of Adjustment, 595 N.W. 2d 730 (Wis. 1999)
[9] Lopes v. City of Peabody, 718 N.E.2d 846 (Mass. 1999)
[10] Tretbar, Calculating Compensation for Temporary Regulatory Takings, 42 U. Kan.L.Rev. 201, 217 (1993).

A. MORATORIA ARE NOT "MERE PLANNING DELAYS."

There are those who claim, some more sincerely than others, that moratoria are nothing more than mere delays inherent in the land use approval process, much like time spent reviewing permit applications or the time spent in public hearings.

Nothing could be further from the truth.

One need go no further than a local newspaper to see that moratoria are often a political tool rather than one used selectively by planners. In Bangor, Maine, "[a] new petition drive may result in another vote on a proposal to temporarily ban large commercial [construction] projects."[11] "In the face of a serious election challenge, the current Brookfield administration has declared a building moratorium on Captiol Drive," reads the first line of a story from Wisconsin.[12] In San Diego, California, "[c]ounty planning commissioners yesterday declined to get involved in the debate over a proposed building moratorium . . . . 'It's a highly political issue,' said [one] commissioner."[13] "In the wake of bitter neighborhood opposition to a proposed McDonald's, Ventura officials are considering an eight-month ban of most commercial development," reads another report.[14]

These stories are representative of what can only be described as nakedly political efforts to strip away the

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[11] Stephany Boyd, *New Vote Possible for Blue Hill Ban*, Bangor Daily News, March 26, 1998.
[12] John Fuchs, *Moratorium No Substitute for Poor Planning*, Milwaukee Journal Sentinel, February 14, 1998, at 2.
[13] Luis Monteagudo Jr., *Planners Sidestep Building Moratorium Issue*, San Diego Union-Tribune, July 14, 2001, at B3:2.
[14] Steve Chawkins, *Ventura Mulls Building Moratorium*, Los Angeles Times, June 4, 2001, at B4.

property rights of the few for the satisfaction of the many. In fact, moratoria are even used to override professional land use management plans adopted by communities but later opposed by the local 'not-in-my-backyard' choir.[15] Moratoria, if anything, are certainly not normal parts of the planning process.

One legal newspaper summed up the role that moratoria are actually playing in the development process. "In an effort to forestall development, towns will sometimes enact moratorium statutes. Developers confronted with such moratorium statutes must decide whether to risk antagonizing town officials by litigating or wait for the moratorium to be lifted."[16]

As such, courts can not reasonably consider moratoria to be within the scope of a normal plan or permit review process. They are powerful, damaging regulations, which need to be considered in the same legal light as any other governmental action that takes property.

B. LAND IS FUNDAMENTALLY DIFFERENT FROM OTHER PROPERTY, AND IMPACTED FAR DIFFERENTLY BY A TEMPORARY FREEZE ON USE.

In analyzing the petitioners' claims, the Ninth Circuit Court of Appeals suggests two categories of economic consequences resulting from temporary property restrictions. In the first instance, a permanent regulation subsequently invalidated that results in the loss of all economic, beneficial or productive use, while in effect, is

[15] See, e.g., Mike Lindbolm, *Newcomers Opposition To Development Refueled Anti-Growth Movement*, Seattle Times, June 4, 1999, at B3.
[16] Scott Mollen, *Moratorium Declared Unconstitutional*, 206 N.Y. L.J. 4 (1991).

categorized as a "temporary taking", compensable under the Fifth Amendment.

In the second instance, a temporary regulation that results in a loss of all economic, beneficial or productive use, while in effect, is categorized by the court as a mere fluctuation in value. The Ninth Circuit perceives this fluctuation like a series of tickertape readings of stock market price quotations, even though the actual economic loss may be identical to that in the first category.

An ownership interest in land differs greatly from an ownership interest in a share of stock. Land is tangible; stock is intangible. Stock will fluctuate in value from the time it is purchased until the time it is sold. Land will also fluctuate in value from the time it is purchased, until sold. However, unlike stock, in that interval between purchase and sale, land may be used. It may be farmed, leased, built upon, subdivided, mined, or employed for income production in countless ways. Given adequate resources, the only limits are those of imagination, and government restrictions.

The economic effect from the loss of all beneficial, productive or economic use of land is a permanent effect that is not restored by the cessation of the temporary regulation. A crop has not been harvested, rents have not been collected, income has not been realized.

It is this concept that the Ninth Circuit, and other courts, fails to comprehend. If a governmental regulation halted pension payments to retirees, no one would accept an argument that no taking would occur if the grandchildren of those individuals were later able to collect the money, without interest, years later. Yet that argument is made regularly with regard to real property whenever a court claims that "sometime in the future" the

land can still be used, even if it that means by some future owner (including the descendants of the present owner).

That land is perpetual is used to justify stripping away present value on the basis of potential future uses, conveniently ignoring the reality of the saying 'in the long run, we're all dead' – including the current owners of that moratoria-strangled parcel of real property.

This Court must clearly explain this simple but deeply misunderstood reality through this opinion, and remind other courts that when real property is taken, justice delayed is indeed justice denied. That real property may last indefinitely does not support the proposition that it can never suffer a temporary taking.

C. CALCULATION OF ACTUAL DAMAGES SHOULD BE THE PRIMARY ANALYSIS IN THE COMPENSATION PHASE OF A TAKINGS CASE, NOT WHEN DETERMINING WHETHER OR NOT A TAKING HAS OCCURRED.

Courts such as the Ninth Circuit have consistently confused the establishment of a takings claim with the calculation of the precise degree of just compensation owed a private property owner. Time and again judges have focused on how little actual damage they perceive has occurred in the takings case before them, basing their judgments on little more than the self-protective pleas of local governments or their own often minimal understanding of the land development process.

The demand that petitioners prove they have lost everything in order to receive any compensation at all has

led to comments like this from Judge Smith of the Federal Court of Claims:

> The notion that the government can take two- thirds of your property and not compensate you but must compensate you if it takes 100% has a ring of irrationality, if not unfairness, about it. If the law said that those injured by tortious conduct could only have their estates compensated if they were killed, but not themselves if they could still breathe, no matter how seriously injured, we would certainly think it odd, if not barbaric. Yet in takings trials, we have the government trying to prove that the patient has a few breaths left, while the plaintiffs seek to prove, often at great expense, that the patient is dead. This all-or-nothing approach seems to ignore the point of the Takings Clause.

Florida Rock Indus. v. United States, 45 Fed. Cl. 21, 23 – 24 (1999).

Indeed, it does ignore the point of the Takings Clause to rule that while a property owner may have suffered grievous financial loss as the result of a governmental moratorium, if even a bare smidgen of value remains – at least to the court – no takings claim can stand.

That calculating actual damages in a moratorium case can present somewhat of a challenge is understandable. "Identification of what the property owner has lost as a result of the land- use regulation in question is not an easy process."[17] Another commentator notes that, "[u]nlike permanent takings, where the condemnor pays the owner the full fair market value for the property acquired,

[17] Tretbar, 42 U. Kan. L. Rev. at 216.

temporary takings suggest alternative compensatory schemes simply because they are temporary."[18]

Unlike most other regulations, moratoria place an immediate and complete freeze on the use of property. While this freeze is theoretically finite, during its existence an owner losses 100% of his ability to use his property in any way contrary to the restrictions imposed under the moratoria. Of course, due to the nature of real property, the land is unlikely to have lost 100% of its value during the moratorium, though the actual damages could be substantial.

What may work most efficiently to balance such a difficult legal equation is a two-step takings analysis using the well-developed concept of distinct investment-backed expectations. First, a court would use these investment-backed expectations as a simple threshold requirement, where proof of deprivation of economically viable use of property would be enough to show the existence of a taking. Second, these same distinct expectations would be weighed as the central component of the debate over compensation, where each side would be free to battle over how much – if anything – should actually be awarded.

Rather than forcing plaintiffs to show the elimination of all economic value to prove governmental liability for a takings claim, a plaintiff would be required to show only the existence of distinct, investment-backed expectations and evidence indicating the degree to which they have been frustrated. The government, at this threshold stage, could present evidence challenging the degree of impact, or the validity of the expectations in the first place.

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[18] David Schultz, *The Price is Right! Property Valuation For Temporary Takings*, 22 Hamline L. Rev. 281, 301 (1998).

However, instead of battling over percentages of loss and the full impact of the regulation upon the property, here a court would need only ascertain that 1) distinct investment-backed expectations exist, and that 2) they have been frustrated because the property owner has been denied the ability to put his land to economically viable uses for a period of time.

That such a focus is not only reasonable but central to most takings analysis is echoed throughout cases of this Court and others. "The economic impact of the regulation, especially the degree of interference with investment-backed expectations, is of particular significance." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); "[I]nterference with distinct investment-backed expectations, [is] a way of limiting takings recoveries to owners who could demonstrate that they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime." *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1177 (Fed. Cir. 1994); "Even if the governmental regulation has not entirely destroyed the property's value, a taking can occur if the regulation has a severe enough economic impact and the regulation interferes with distinct investment-backed expectations. . . . The reasonable investment-backed expectation of the claimant is critical to this analysis. . ." *Mayhew v. Town of Sunnyvale*, 964 SW2d 922, 937 (Texas 1998).

This focus on effect would also steer the takings debate away from the far too commonly addressed and constitutionally invalid focus on governmental intent. "[T]he Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does." *Hughes v. Washington*, 389 U.S. 290, 298 (Stewart, J. concurring).

CONCLUSION

The National Association of Home Builders respectfully requests this Court to rule that moratória should indeed be analyzed as temporary takings for all the reasons described above, and to reverse the decision of the U.S. Court of Appeals for the Ninth Circuit.

DATED: September 12, 2001

Respectfully submitted,

*Christopher G. Senior
David Crump
National Association
of Home Builders
**Counsel of Record for*
Amicus Curiae

September 12, 2001

(9)

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In the

Supreme Court of the United States

TAHOE SIERRA PRESERVATION COUNCIL, INC.,
a California nonprofit corporation and
membership organization, et al.,

Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY,
a separate legal entity created pursuant
to Bi-State Compact, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICI CURIAE OF PACIFIC LEGAL FOUNDATION AND CALIFORNIA ASSOCIATION OF REALTORS® IN SUPPORT OF PETITIONERS TAHOE-SIERRA PRESERVATION COUNCIL, ET AL.

JUNE BABIRACKI BARLOW, ESQ.
Vice President and General Counsel
SONIA M. YOUNGLOVE, ESQ.
Senior Counsel
California Association
of REALTORS®
525 South Virgil Avenue
Los Angeles, California 90020-1403
Telephone: (213) 739-8200
Facsimile: (213) 480-7724

*R. S. RADFORD
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

**Counsel of Record*

Counsel for Amici Curiae
Pacific Legal Foundation and California Association of REALTORS®

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QUESTION PRESENTED

Whether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the Takings Clause of the United States Constitution?

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INTEREST OF AMICI CURIAE[1]

Since 1973, amicus Pacific Legal Foundation (PLF) has litigated in support of the constitutional rights of individuals to make reasonable use of their private property. PLF has participated as amicus curiae in nearly every Fifth Amendment takings case heard by this Court over that time, and PLF attorneys were counsel of record in three of them: *Palazzolo v. Rhode Island*, 121 S. Ct. 2448 (2001), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

PLF believes that its public policy perspective and litigation experience will provide an additional viewpoint that will assist the Court in its deliberations on the issues presented by this case. In the course of representing Mrs. Bernadine Suitum before this Court, and in supporting the present petitioners as amicus curiae in the courts below, PLF attorneys have gained unique insights into the plight of Tahoe-area residents who are subjected to the harsh and inflexible restrictions imposed by the Tahoe Regional Planning Agency (TRPA, respondent herein). Like Mrs. Suitum, many of the present petitioners have grown old while vainly striving to achieve their dream of building modest retirement homes on subdivided lots in fully or partially developed residential neighborhoods.[2] Tahoe residents have repeatedly pursued

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, amici curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

[2] Sadly but tellingly, some 55 of the original plaintiffs in this proceeding have died while waiting for TRPA to relax the

(continued...)

regulatory takings claims against TRPA to the United States Court of Appeals for the Ninth Circuit, only to have that court defer to TRPA's regulatory mission by invoking unique and creative jurisprudential theories to bypass the requirements of the Takings Clause. The present case is merely the latest example of this pattern, just as the "temporary moratorium" at issue here is merely one element in an interlocking web of land use prohibitions stretching back to TRPA's earliest days.

California Association of REALTORS® (CAR) is a nonprofit, voluntary, trade association incorporated in California whose members consist of local Boards and Associations of REALTORS®, and approximately 94,000 persons licensed as real estate brokers and salespersons by the state of California, as well as affiliate members such as real estate appraisers, title insurers, mortgage lenders, and real estate attorneys. Furthermore, CAR is actively engaged in promoting and establishing reasonable standards to govern the transfer of real estate and the protection of private property rights. CAR pursues its objectives through a variety of methods, including education of its members, creation of standard form agreements for use in real estate transactions, lobbying, providing legal advice to its members, and participation as amicus curiae in relevant court cases. Members of CAR assist the public in buying, selling, leasing, developing and managing residential, commercial and industrial real estate as well as mobile homes.

Unfortunately, due to the oftentimes misguided, or in some cases even hostile, actions that local governmental entities and courts have taken with regard to landowners' constitutional rights, CAR has been actively involved in land use and takings cases. CAR has participated previously as amicus curiae before

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[2] (...continued)
"temporary" restrictions that have deprived them of the beneficial use of their property for decades. *See* Petition for Writ of Certiorari at 3 n.4.

numerous courts including the seminal cases of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); and more recently in *Pennell v. San Jose*, 485 U.S. 1 (1988), and *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999).

The ruling by the Ninth Circuit Court of Appeals in this case makes it imperative that CAR once again participate as amicus curiae. The Ninth Circuit's flawed analysis and decision represents a fundamental misunderstanding and misapplication of this Court's well-established precedents.

STATEMENT OF THE CASE

In 1969, the Tahoe Regional Planning Agency was created by a bi-state compact to control development in the Lake Tahoe region of California and Nevada. Eleven years later, Congress amended the compact to strengthen TRPA's authority. Almost immediately, TRPA asserted its new powers by adopting Ordinance 81-5, the first in a series of moratoria prohibiting any beneficial use of much of the private property subject to the agency's jurisdiction. In one form or another, TRPA's "temporary" building prohibition has lasted for 20 years.

Ordinance 81-5 was quickly augmented by TRPA's Resolution 83-21, which suspended all permitting activities by the agency. Ostensibly to expire after 90 days, Resolution 83-21 was extended until a new regional plan was developed in April of 1984, 32 months after the adoption of the initial moratorium. For many of the region's residential property owners, including the petitioners in the present action, TRPA's formal lifting of the moratorium was of no practical consequence, since development of their properties was flatly forbidden by the 1984 plan. Although both the trial court below and the Ninth Circuit made much of the fact that the 1984 plan itself was promptly suspended by a court injunction, this made no difference to owners who had been deprived of all beneficial

use of their residential lots continuously since 1981, and were still forbidden to build on their land under the terms of the 1984 and subsequent regional plans.

The petitioners in this case are residential property owners in the Tahoe region who have been deprived of all economically viable use of their land by TRPA's development moratoria. In 1984, these owners filed an action asserting that TRPA's restrictions on the use of their lots amounted to a regulatory taking of their property for public use without just compensation. Over the next 15 years, this litigation resulted in 11 published opinions by the Federal District Courts of California and Nevada, the Ninth Circuit Court of Appeals, and this Court. Finally, in 1999, the surviving landowners accomplished their goal of obtaining an 11-day bench trial before the United States District Court for the District of Nevada. In that proceeding, the trial court determined, *as a factual matter*, that Ordinance 81-5 and Resolution 83-21 had deprived the petitioners of all economically viable use of their property, thereby triggering the constitutional requirement of just compensation. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 34 F. Supp. 2d 1226, 1243-45 (D. Nev. 1999).

The Ninth Circuit Court of Appeals reversed. Although it did not disturb the factual finding that TRPA's moratoria had deprived petitioners of all economically viable use of their property, the appellate panel held that no compensation was required under the Takings Clause. *See Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 216 F.3d 764, 777 (9th Cir. 2000). Judge Reinhardt, writing for the unanimous panel, opined that the relevant property interests for purposes of Fifth Amendment takings analysis are "the whole parcels of property that [petitioners] own," *id.* at 779, and that these parcels should be defined to include the actual or potential use of the property "from the present to the future." *Id.* at 782. Under this reasoning, TRPA's denial of all use of

the petitioners' land affected only "finite temporal segments." *Id.* at 778. The agency's absolute prohibition of the use of these homesites for their intended purpose—a prohibition that has continued in effect for two decades—was seen as affecting only "a small fraction of the useful life of the Tahoe properties." *Id.* at 782. Compensation was not required under the Takings Clause because, as the Ninth Circuit reasoned, TRPA's development ban had not confiscated the entire "temporal dimension" of the petitioners' ownership interests. *Id.*

SUMMARY OF ARGUMENT

For 20 years, TRPA has deprived Tahoe property owners of all beneficial use of their land under a series of restrictive moratoria and regional plan provisions. The deprivations suffered by the present petitioners under Ordinance 81-5 and Resolution 83-21 are no different in incidence or effect than those effected under TRPA's 1984 regional plan, or the 1987 plan currently in effect. Isolating a single 32-month period out of the past two decades for evaluation as an independent, "temporary" violation of the petitioners' rights risks losing sight of the important context of TRPA's continuous prohibitions, of which this period of time was a small element. It is undisputed that the Takings Clause requires just compensation when regulations deprive owners of all economically viable use of their land. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992), and that

> "temporary" takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation.

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 318 (1987). Although carving out the 32-month period at issue here is essentially

arbitrary,[3] as TRPA's policy toward the petitioners during that period did not differ from its ongoing development ban, compensation for the fair value of petitioners' property over that time is mandated by *Lucas* and *First English*.

Over this same period of time, the Ninth Circuit Court of Appeals has repeatedly deferred to TRPA's unique construction of the Takings Clause of the Fifth Amendment. This Court has twice been called upon to reverse the Ninth Circuit on these issues and rule that TRPA is indeed subject to the constraints of the Takings Clause. This Court should use the present case as an opportunity to forthrightly address this issue, and deliver an unmistakable message to TRPA and the Ninth Circuit that no instrumentality of government is beyond the reach of the Constitution.

Finally, the decision below rests on the alleged need to avoid "conceptual severance" in regulatory takings claims. However, the notion of conceptual severance is a red herring that contributes nothing of substance to the evaluation of whether restrictive land use regulations have deprived an owner of all beneficial use of a recognized property interest protected by the Takings Clause. As the decision below exemplifies, virtually any real-world property interest can be "conceptually merged"[4] into some greater, more abstract conception of

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[3] The 32-month period currently at issue before this Court is merely a residual, petitioners' takings claims for the remainder of the 20 years having been defeated by the trial court's application of the statute of limitations, an erroneous ruling that a court order enjoining implementation of the 1984 regional plan somehow absolved TRPA of responsibility for depriving petitioners of the use of their land from 1984 through 1987, etc. *See Tahoe-Sierra*, 216 F.3d at 770-71.

[4] Whether the process is denoted as conceptual merger, "conceptual agglomeration" (*see* Steven J. Eagle, *Regulatory Takings* § 8-2(h) (1996)), or "conceptual composition," (*see* R. S. Radford, *Regulatory*
(continued...)

property for the purpose of concluding that the abstraction has not been taken. This is a sterile exercise that should be rejected in favor of a good-faith examination of the actual impact of TRPA's restrictive land use regulations on the actual property interests owned by the petitioners now before this Court.

ARGUMENT

I

THE MORATORIUM AT ISSUE IN THIS CASE IS ONLY ONE SMALL ELEMENT IN TRPA'S LONG HISTORY OF ABUSING THE RIGHTS OF TAHOE PROPERTY OWNERS WHILE EVADING THE CONSTITUTIONAL MANDATE OF JUST COMPENSATION

Lake Tahoe property owners have been attempting for two decades to obtain permission to build vacation or retirement homes on their land. Throughout that time TRPA has frustrated their efforts, while the Ninth Circuit Court of Appeals has consistently deferred to the agency's regulatory initiatives. As petitioners themselves capably argue, the moratorium at issue in this case, standing alone, is sufficiently onerous to trigger the requirement of just compensation under the Takings Clause. In a broader sense, however, this 32-month deprivation must be understood as merely one element—and indeed a relatively minor one—in TRPA's long-term strategy of banning all economically viable use of privately owned land within its jurisdiction, while evading the constitutional mandate of providing just compensation to the owners.

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[4] (...continued)
Takings Law in the 1990's: The Death of Rent Control?, 21 Sw. Univ. L. Rev. 1019, 1067 n. 284 (1992)), this relatively trivial intellectual exercise has the potential to eviscerate the protections of the Takings Clause in all cases short of the outright confiscation of title to the entirety of an individual's assets.

A. The "Temporary" 32-Month Development Freeze Under Ordinance 81-5 and Resolution 83-21 Was Part of an Ongoing Restrictive Scheme That Deprives Petitioners of All Beneficial Use of Their Property to This Day

Both the trial court and the Ninth Circuit in the proceedings below analyzed TRPA's Ordinance 81-5 and Resolution 83-21 as if these measures imposed an isolated, temporary, 32-month development ban on the petitioners' property. In fact, from the viewpoint of the landowners, this period was indistinguishable from any other time interval since TRPA began exercising its powers under the 1980 compact. The specific legislative rationale has changed from time to time, but TRPA has denied these individuals the right to make any beneficial use of their property continuously for the past 20 years.

As Professor Eagle has noted concerning this case:

> [T]here is no clear-cut distinction between a permanent prohibition and a temporary one. This is so both because of the possibility that one "temporary" regulatory barrier could be crafted after another, with no individual regulation being deemed a taking. The facts in *Tahoe-Sierra* well illustrate that point. More fundamentally, regulations now "permanent" may be fleeting and regulations now "temporary" may endure for generations.[5]

That TRPA's "temporary" moratorium has for all practical purposes endured indefinitely is confirmed by the experience of Bernadine Suitum, who was subjected to the same deprivations

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[5] Steven J. Eagle, *Temporary Regulatory Takings and Development Moratoria: The Murky View from Lake Tahoe*, 31 Env'tl L. Rep. 10224, 10227 (2001).

under TRPA's 1987 plan that the present petitioners suffered under Ordinance 81-5 and Resolution 83-21.

In 1989, when Mrs. Suitum applied for permission to build a small A-frame on her residential subdivision lot in Incline Village, Nevada, her parcel was one of the last remaining undeveloped lots in the subdivision. The property was bordered by existing homes on three sides, and on the fourth by a well-maintained paved street. A fire hydrant stands near one corner of the lot, and utility lines (including cable television service) pass overhead. Nevertheless, acting under authority of its 1987 Regional Plan, TRPA denied Mrs. Suitum's request to build a modest retirement home on her parcel. Indeed, the agency responded to her application by classifying her lot as lying within a "Stream Environment Zone" (SEZ)—a classification, shared by many of the present petitioners, on which "no new land coverage or other permanent land disturbance shall be permitted."[6] Her property was also declared unbuildable under TRPA's Individual Parcel Evaluation System (IPES). Faced with the irony of its declaring a single vacant lot in the middle of a busy, fully built out subdivision as too environmentally sensitive to allow the soil to be disturbed, TRPA was unfazed: according to the agency, the fact that Mrs. Suitum's lot was "surrounded by developed parcels and is serviced by a paved street and utilities is not part of the IPES scoring elements."[7]

TRPA's intransigence seemed especially odd in that its hard-line position applied solely to *private* development of the property. Under the same code that allowed TRPA's bureaucrats to deprive Mrs. Suitum of all use of her retirement

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[6] *See* 1987 Regional Plan for the Lake Tahoe Basin at iv-15; TRPA Code of Ordinances § 20.4.B.

[7] *Suitum v. Tahoe Regional Planning Agency*, Opposition to Defendant's Motion for Summary Judgment, Court Record (CR) 68, Exhibit 2 at 14.

homesite, *governmental* development of the same property would have been acceptable.[8] Nevertheless, with respect to private residential owners such as the present petitioners, it is clear that TRPA's position under the current 1987 plan is in no way less restrictive than it was 20 years ago, under Ordinance 81-5 and Resolution 83-21. The only difference is that today, owners of properties that TRPA brands "SEZ" are *allowed to apply* for permission to make some beneficial use of their land; however, there is no possibility that such permission will be granted.

Nine years ago, this Court laid down the categorical rule that the Takings Clause requires just compensation whenever regulations deprive owners of all economically viable use of their land. *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1015. Five years before that this Court established that

> "temporary" takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation.

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. at 318. Although carving out the 32-month period at issue here is essentially arbitrary, as TRPA's policy toward the petitioners during that period did not differ from the ongoing development ban it has pursued down to the present day, compensation for the fair value of petitioners' property over the life of Ordinance 81-5 and Resolution 83-21 is mandated by *Lucas* and *First English*.

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[8] According to TRPA's regional plan, land in a SEZ will support no new *private* land coverage or permanent land disturbance whatsoever, but may be used for public recreation facilities or public service facilities. *See* 1987 Regional Plan for the Lake Tahoe Basin, at iv-25-26.

B. The Opinion of the Ninth Circuit Below Is Merely the Latest in a Line of Decisions in Which That Court Has Deferred to TRPA's Regulatory Mission, Effectively Insulating the Agency from Constitutional Constraints Under the Fifth Amendment

Residents and would-be residents of the Tahoe region have sought compensation from TRPA for the taking of their property since before the adoption of the 1980 compact. Unfortunately for these property owners, the United States Court of Appeals for the Ninth Circuit has repeatedly deferred to TRPA's regulatory mission by effectively insulating the agency from constitutional constraints under the Fifth Amendment.

The first inverse condemnation claim against TRPA to reach the Ninth Circuit was *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353 (9th Cir. 1977). In that case, developable land that had previously been zoned as residential, multiple residential, and commercial was downzoned under TRPA's guidelines to "general forest," "recreation," and "conservation reserve." *Id.* at 1357-58. In that case, the court of appeals held that the Eleventh Amendment granted TRPA absolute immunity from liability under the Takings Clause; even though the agency's regulations might deprive Tahoe landowners of all productive use of their property, the owners had no recourse under the Fifth Amendment. *Id.* at 1360. This Court granted certiorari and reversed the Ninth Circuit, thereby establishing a pattern that continues to this day. *See Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979).

On remand from this Court, the United States District Court for the District of Nevada ruled that, even though Eleventh Amendment immunity did not pertain, applying the Takings Clause to TRPA would nevertheless be "inappropriate" because, *inter alia*, the agency lacked formal condemnation

authority. *See Jacobson v. Tahoe Regional Planning Agency*, 474 F. Supp. 901, 903 (D. Nev. 1979).[9] This ruling was affirmed without opinion by the Ninth Circuit, *see Jacobson v. Tahoe Regional Planning Agency*, 661 F.2d 940 (9th Cir. 1981).

Comparable judicial deference to TRPA's mission was displayed when an earlier incarnation of the present litigation reached the Ninth Circuit more than a decade ago. *See Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 911 F.2d 1331 (9th Cir. 1990). On that occasion, the appellate court coined a new "ripeness" requirement for regulatory takings claims—holding that property owners whose land has been stripped of all beneficial use are required to *seek an amendment to the offending agency's general plan* prior to filing suit for inverse condemnation. *See id.* at 1336-39. This was a completely unprecedented requirement—forcing citizens to engage in political lobbying as a condition precedent to being allowed to exercise their First Amendment right to petition the government in court. In the words of one commentator:

> In conjunction with the already burdensome requirements of finality and exhaustion of state compensation procedures, this new requirement would have transformed the Fifth Amendment's just compensation mandate into a theoretical pipe dream for private property owners.[10]

[9] The district court also held that the landowners could not maintain a suit for damages against TRPA for violation of their civil rights under 42 U.S.C. § 1983 on the circular reasoning that if compensation were not available for TRPA's "confiscatory" regulations under the Takings Clause, injured property owners should not be allowed to sue for damages for the agency's violation of their due process rights. 474 F. Supp. at 904.

This rule has only been applied by the Ninth Circuit to takings claims asserted by those property owners against TRPA and has not been imposed on any other litigants, before or since. *See Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 938 F.2d 153, 157 (9th Cir. 1991).

A further example of deference to TRPA can be found in *Suitum v. Tahoe Regional Planning Agency*, 80 F.3d 359 (9th Cir.), *cert. granted*, 519 U.S. 926 (1996), *vacated*, 123 F.3d 1322 (1997). There, the Ninth Circuit ruled that, although TRPA had deprived an elderly widow of all beneficial use of her retirement homesite, the landowner could not state a regulatory taking claim until she canvassed the region in an attempt to find buyers for three types of administrative credits which the agency had created. *Id.*, 80 F.3d at 362-63. Once again, this Court granted certiorari and reversed the Ninth Circuit. *See Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997). As Chief Justice Rehnquist commented at oral argument, the Ninth Circuit had denied Mrs. Suitum the right to pursue her constitutional remedy against TRPA based on an argument that essentially reduced to:

> TRPA says you can't use your lot but here's some scrip, you go over to Harrah's and you can play roulette with it.[11]

[10] Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. W. L. Rev. 1, 33 (1992).

[11] *Suitum v. Tahoe Regional Planning Agency*, No. 96-243, Transcript of Oral Argument, 1997 U.S. TRANS LEXIS 22, 26.

Unfortunately, it appears that no matter how often this Court rebuffs TRPA's attempts to take private property for public use without paying any compensation, the Ninth Circuit continues to defer to TRPA's unique construction of the Fifth Amendment. This Court should use the present case as an opportunity to forthrightly address this issue, and deliver an unmistakable message to TRPA and the Ninth Circuit that no instrumentality of government is beyond the reach of the Constitution.

II

"CONCEPTUAL SEVERANCE" IS AN EMPTY CONSTRUCT THAT CONTRIBUTES NOTHING TO A MEANINGFUL JURISPRUDENCE OF REGULATORY TAKINGS

Judge Reinhardt's opinion for the Ninth Circuit was expressly based on the supposed need to avoid "conceptual severance" in takings claims:

> Property interests may have many different dimensions. For example, the dimensions of a property interest may include a physical dimension (which describes the size and shape of the property in question), a functional dimension (which describes the extent to which an owner may use or dispose of the property in question), and a temporal dimension (which describes the duration of the property interest). At base, the plaintiffs' argument is that we should ***conceptually sever*** each plaintiff's fee interest into discrete segments in at least one of these dimensions - the temporal one - and treat each of those segments as separate and distinct property interests for purposes of takings analysis. Under this

> theory, they argue that there was a categorical taking of one of those temporal segments.[12]

"Conceptual severance" is a term that was introduced into legal parlance by Professor Radin in a law review article published 13 years ago:

> [Conceptual severance] consists of delineating a property interest consisting of just what the government action has removed from the owner, and then asserting that that particular whole thing has been permanently taken. Thus, this strategy hypothetically or conceptually "severs " from the whole bundle of rights just those strands that are interfered with by the regulation, and then hypothetically or conceptually construes those strands in the aggregate as a separate whole thing.[13]

In other words, Professor Radin decries what she perceives as the tendency of property owners to seek compensation under the Takings Clause when government action or regulation has deprived them of discrete, identifiable property interests that constitute less than the totality of their holdings. This theme was embellished by Judge Reinhardt in the opinion below, in finding that TRPA was not liable for a taking because the landowners (or their descendants) would retain most of the

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[12] *Tahoe-Sierra*, 216 F.3d at 774 (emphasis added).

[13] Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 Colum. L. Rev. 1667, 1674-78 (1988), *cited in* opinion below, 216 F.3d at 776. Although the term originated with Radin, the concept itself traces back to Michelman: "It might . . . appear that the scope of the 'thing' subject to devaluation is to be defined by the incidence of the measure itself." Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1193 (1967).

"useful life" of their land after the agency had finished prohibiting them from putting it to any beneficial use.[14] However, this was not the only way the court below could have employed the "conceptual severance" paradigm to arrive at the same outcome.

In a more recent article than the one relied upon by the court below, Professor Coletta has pointed out that there is yet another "dimension" to property:

> In the *vertical dimension*, the relevant parcel is viewed columnally from the depths of the earth to the heights of the sky.[15]

Viewed in this way, it seems highly dubious that a property owner should be allowed to claim a Takings Clause violation simply because land use regulations have deprived him of all beneficial use of that tiny sliver of his property that happens to coincide with the surface of the earth.[16] Thus, just as the "temporal" dimension of property can be conceptually extended until any taking for a span of years can be portrayed as de minimus, so we can conceptually enlarge holdings "vertically" until any taking of the surface estate can be portrayed as a negligible intrusion.

Regardless of the particular model we choose to employ, analysis of "conceptual severance" rests on a logical sleight-of-hand. Behind Professor Radin's reasonable-sounding reference to property interests consisting of less than "the whole bundle"

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[14] 216 F.3d at 782.

[15] Raymond R. Coletta, *The Measuring Stick of Regulatory Takings: A Biological and Cultural Analysis*, 1 U. Pa. J. Const. L. 20, 36 (1998).

[16] *See id.* at 43-44.

lurks an unspoken premise that there is some objectively *complete* "bundle" of rights--which, not coincidentally, always consists of more than what has been taken in any particular case.

In the decision below, the Ninth Circuit found that compensation was not required because a 32-month deprivation of all use was but "a small fraction of the useful life of the Tahoe properties."[17] But exactly the same statement would apply to a 32-*year* "slice" of the properties' temporal dimension. Indeed, a moratorium lasting for 32 *centuries* would deprive the Tahoe property owners of less than .0001% of the expected remaining useful life of their properties, according to the best available scientific estimates.[18]

Taken together, Judge Reinhardt's and Professor Coletta's models make an important point: at the conceptual level, property is a completely abstract concept, without temporal or spatial limits. Property only acquires its utilitarian function when human beings apply their intellects to the task of cutting, trimming, and defining specific interests and estates out of that primordial abstraction. Thus, the question is not whether we should engage in conceptual severance; *we always do!* The existence of identifiable, usable, exchangeable property interests in the real world is entirely the result of man's ingenuity in conceptually carving those interests out of the initial abstraction of property without temporal or spatial boundaries. The relevant question, in every takings case, is not whether the property interest at issue arose through conceptual severance—*it invariably did*—but whether that particular

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[17] 216 F.3d at 782.

[18] *See, e.g., American Frozen Food Institute v. Train*, 539 F.2d 107, 113 (D.C. Cir. 1976) (noting in dicta that conditions for sustaining life on earth "are likely to be enjoyed for another four or five billion years").

interest is one that is recognized and protected under the Fifth Amendment.

The answer to this question will vary on a case by case basis, and the notion of conceptual severance adds nothing to the analysis. Both this Court and the lower federal and state courts have routinely found regulatory takings of specific spatial, functional, and temporal property interests that could easily have been—but were not—folded into more extensive conceptions of property. Specific, severable interests that have been recognized as protected by the Takings Clause include flowage easements,[19] contractual commitments,[20] liens against real estate[21] and vessels,[22] the right to exclude third parties[23] and the general public,[24] and the right to devise property to one's heirs.[25]

These examples illustrate the long-recognized phenomenon of "unbundling" property interests for purposes

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[19] *United States v. Virginia Electric and Power Co.*, 365 U.S. 624 (1961).

[20] *Lynch v. United States*, 292 U.S. 571 (1934).

[21] *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935).

[22] *Armstrong v. United States*, 364 U.S. 40 (1960).

[23] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

[24] *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

[25] *Hodel v. Irving*, 481 U.S. 704 (1987).

of applying the protections of the Takings Clause.[26] In all these cases, the relevant question has been perceived to be not whether the courts can conceive of some more inclusive property interest that has *not* been taken, but whether the interest that *has* in fact been taken qualifies for protection under the Fifth Amendment. As has been noted by the Federal Circuit Court of Appeals:

> Nothing in the language of the Fifth Amendment compels a court to find a taking *only* when the Government divests the total ownership of the property.[27]

This Court should similarly recognize that the notion of "conceptual severance" is a red herring. As Judge Reinhardt and Professor Coletta have shown, it is *always* possible to fold any given property interest into some broader conception of property, for the purpose of concluding that the broader conception has not been taken. But this cannot be the basis of a serious Fifth Amendment jurisprudence.

If a local ordinance prohibits a newspaper from publishing criticisms of elected officials, no one could seriously argue that the First Amendment was not violated because the paper remains free to print all manner of other material. Only one "tiny slice" of the conceivable spectrum of communication has been foreclosed, yet that would certainly be sufficient to trigger the protections of the First Amendment.

Similarly, a crime-fighting initiative that authorized random, warrantless searches of private homes between the

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[26] *See* Craig A. Peterson, *Recent Development in "Takings" Jurisprudence: Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches*, 39 Hastings L.J. 335, 357 (1988).

[27] *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1568-69 (Fed. Cir. 1994).

hours of 4:00 and 5:00 a.m. could not withstand attack under the Fourth Amendment on the grounds that no such intrusions are authorized during the remaining 23 hours of each day. Even though it could be shown that there are *an infinite number* of points of time during which citizens subject to this ordinance would *not* be subjected to arbitrary searches, the protection of the Bill of Rights would clearly foreclose the searches conducted during the single hour.

In each of the above examples, it is simply irrelevant to inquire what freedoms *remain* under the ordinances; the Constitution is concerned with the freedoms that have been *abridged*. As this Court has observed:

> We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.[28]

While the useful life of the Tahoe properties may extend well beyond TRPA's planning moratorium, the lives of the individual property owners represent much smaller slices of the "temporal whole." The surviving residential property owners who are now before this Court should not be denied compensation for the 20 years they have been denied the right to make use of their property merely because their land will endure far beyond their own lifetimes.

CONCLUSION

For the reasons stated above, amici Pacific Legal Foundation and California Association of REALTORS® respectfully request this Court to reverse the decision below and

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[28] *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

instruct the court of appeals to remand this matter to the federal district court for a determination of just compensation.

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Respectfully submitted,

JUNE BABIRACKI BARLOW, ESQ.
Vice President and General Counsel
SONIA M. YOUNGLOVE, ESQ.
Senior Counsel
California Association
of REALTORS®
525 South Virgil Avenue
Los Angeles, California 90020-1403
Telephone: (213) 739-8200
Facsimile: (213) 480-7724

*R. S. RADFORD
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

**Counsel of Record*

Counsel for Amici Curiae Pacific Legal Foundation and California Association of REALTORS®

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In the

Supreme Court of the United States

TAHOE SIERRA PRESERVATION COUNCIL, INC., *ET AL.*,
Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY, *ET AL.*,
Respondents.

On Writ of Certiorari to
the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF DEFENDERS OF PROPERTY RIGHTS IN SUPPORT OF PETITIONER

Nancie G. Marzulla*
Brenda D. Smith
DEFENDERS OF PROPERTY RIGHTS
1350 Connecticut Ave., NW
Suite 410
Washington, DC 20036
(202) 822-6770

*Counsel of Record for *Amicus Curiae*

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QUESTION PRESENTED

Amicus curiae will address the following question:

Whether the Ninth Circuit erred in holding that a temporary planning moratorium cannot constitute a temporary taking under the Fifth Amendment of the U.S. Constitution?

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BRIEF *AMICUS CURIAE* OF DEFENDERS OF PROPERTY RIGHTS IN SUPPORT OF PETITIONER

Pursuant to Rule 37.3 of the Rules of this Court, *amicus curiae* submits this brief in support of petitioner.[1] Both parties have consented to the filing of this brief.

[1] No counsel for either party authored this brief *amicus curiae*, either in whole or in part. Furthermore, no persons other than *amicus curiae* contributed financially to the preparation of this brief.

INTERESTS OF AMICUS CURIAE

Defenders of Property Rights is the only national legal defense foundation dedicated exclusively to protecting private property rights. Based in Washington, D.C., Defenders was founded as a non-profit, public interest legal foundation in 1991. Its mission is to protect vigorously those rights considered essential by the Framers of the Constitution, and to promote a better understanding of the relationship between private property rights and individual liberty.

Defenders of Property Rights engages in litigation across the country on behalf of its members and the public interest to prevent government incursion into protections guaranteed by the Bill of Rights. Defenders participated in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Keene Corp. v. United States*, 508 U.S. 200 (1993); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Bennett v. Spear*, 520 U.S. 154 (1997); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526

U.S. 687 (1999); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); and *Palazzolo v. Rhode Island*, 121 S. Ct. 2448 (2001).

STATEMENT OF THE CASE

Since 1969, when California and Nevada signed a compact creating the Tahoe Regional Planning Agency ("TRPA"), property owners in the Lake Tahoe region have been fighting for the right to develop, or make any use at all, of their property. In 1969, TRPA adopted land-use Ordinance No. 4, which, among other things, classified the land in the basin according to its "high" or "low" susceptibility to environmental hazards. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 216 F.3d 764, 767 (9th Cir. 2000).

Subsequently, in 1980, the two states amended the compact so that TRPA could develop a new regional plan. TRPA then enacted two separate measures to prohibit development during formulation of the revised plan. *Id.* at 767-78. First, TRPA enacted Ordinance 81-5, which became effective on August 24, 1981 and prohibited most

residential and all commercial construction on high hazard lands. *Id.* at 768. The second resolution, Ordinance 81-5, which became effective on August 24, 1981, put in place a development moratorium on all development of all of the covered land. *Id.* Although the resolution was drafted to expire after a ninety-day period, it was extended until the new regional plan was adopted. *Id.*

On April 26, 1984, TRPA adopted its new regional plan. *Id.* The restrictions on development of "high-hazard" lands in Ordinance 81-5, however, still remained in place due to temporary measures adopted by TRPA. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 34 F.Supp.2d 1226, 1236 (D. Nev. 1999), *rev'd*, 216 F.3d 764, 767 (9th Cir. 2000). On May 1, 1984, a temporary restraining order was also issued, restricting development of those lands. *Id.* A permanent injunction restricting development was issued in August of 1984, which remained in force until another regional plan was adopted in 1987. *Id.* The restrictions on development of the "high-hazard" lands in the Lake Tahoe area, however, still continue today, under subsequent development plans.

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 228 F.3d 998, 999 (9th Cir. 2000) (denying pet. for rehearing *en banc*) (Kozinski, J., dissenting). Thus, for over two decades, property owners of this "high-hazard" land in the Lake Tahoe region have been restricted from any development of their land.

SUMMARY OF ARGUMENT

In the context of physical takings, this Court recognizes no distinction between takings that are permanent or for an interim period. *See, e.g., United States v. Dow*, 357 U.S. 17 (1958); *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1946); *United States v. General Motors Corp.*, 323 U.S. 373 (1945). Likewise, there should be no distinction, with respect to regulatory takings where there has been a total deprivation of all economically beneficial and productive use of the property.

If any regulation, temporary or otherwise, requires a property owner "to sacrifice all economically beneficial use in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003,

1019 (1992). Indeed, the "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." *Id.* at 1017; *see also United States v. Dow*, 357 U.S. 17 (1958) (holding that temporary use and occupation of property government is a taking for which just compensation is "measured by the principles normally governing the taking of a right to use property temporarily"); *United States v. General Motors Corp.*, 323 U.S. 373, 380 (1945) (holding that government occupancy of property for "a day, a month, a year, or a series of years" has a value that may be unconstitutionally taken without just compensation); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 6-7 (1946) ("These considerations have special relevance where 'property' is 'taken' not in fee but for an indeterminate period.").

Furthermore, as this Court held in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, "temporary takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." 482 U.S. 304, 319 (1987). Thus,

whether a regulation is imposed for three months, three years, or until it may be invalidated by court declaration or abandoned by the government, if the regulation deprives a property owner of all economically beneficial use of his or her land, the Fifth Amendment demands payment of just compensation.

ARGUMENT

I. Whether Permanent or Temporary, a Taking of All Economically Beneficial Use of Property Demands Payment of Just Compensation.

The right to own and enjoy one's property is one of the fundamental rights on which our system of law is based. James Madison wrote "as a man is said to have a right to his property, he may be equally said to have a property in his rights." James Madison, Property, 1 NAT'L GAZETTE 174 (1792) (reprinted in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 480 (1865)). These rights, and more particularly property rights, derive from equitable concepts rooted in common law and in the principles of equity that are reflected in the Just Compensation Clause of the Fifth Amendment. In *Lucas v. South Carolina Coastal Council*,

505 U.S. 1003 (1992), the Court explicitly recognized that the Just Compensation Clause helps define a property owner's understanding of his or her rights in property:

> In the case of land, however, we think that the notion pressed by the council that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Just Compensation Clause that has become part of our constitutional culture.

Id. at 1028 (emphasis supplied)

The historical compact recorded in the Just Compensation Clause is in essence an understanding that government's power will be constrained by principles of fairness. *Armstrong v. United States*, 364 U.S 40 (1960). While a government can, under certain circumstances, "take" private property for public use, any such taking is void unless it provides for fair payment in return. U.S. Const. amend. V; *see also Fuller v. United States*, 409 U.S. 488, 490 (1973) (citation omitted) ("The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness as it does

from technical concepts of property law.").

The requirement of a stable system of property rights for which the government's taking of private property triggers the duty to pay just compensation is reflected throughout takings jurisprudence. For example, in *Nixon v. United States*, 978 F.2d 1269 (D.C. Cir. 1992), the D.C. Circuit Court of Appeals held that "[t]he essential character of property is that it is made up of mutually reinforcing understandings that are sufficiently well grounded to support a claim of entitlement." *Id.* at 1275 (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979) (holding that property consists of recognized expectancies)).

Using this historical basis for the Just Compensation Clause, this Court has extended its application to both physical takings as well as regulatory takings of private property for public use. In *Loretto v. TelePrompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the Court held that physical occupation of private property is a *per se* violation of the Fifth Amendment:

> The historical rule that a permanent physical occupation of another's property is a taking has more than tradition to commend it. Such

> an appropriation is perhaps the most serious form of invasion of an owner's property interests. To borrow a metaphor, the government does not simply take a single "strand" from the "bundle" of property rights: it chops through the bundle, taking a slice of every strand.

Id. at 433-35 (citations omitted).

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Court held that the taking of all beneficial and productive use of private property is tantamount to a physical taking and thus is also a *per se* violation of the Just Compensation Clause:

> [The] total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation. . . . Where "permanent physical occupation" of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted "public interests" involved . . . We believe similar treatment must be accorded confiscatory regulations, i.e., regulations that prohibit all economically beneficial use of land.

Lucas, 505 U.S. at 1017, 1028-29 (citations omitted); *see also Florida Rock Industries, Inc. v. United States*, 18 F.3d

1560, 1564-65 (Fed. Cir. 1994) ("The recent Supreme Court decision in *Lucas* . . . teaches that [i]f a regulation categorically prohibits all economically beneficial use of land--destroying its economic value for private ownership--the regulation has an effect equivalent to a permanent physical occupation. There is, without more, a compensable taking.").

Furthermore, such a regulatory taking may be permanent or temporary. As Justice Kennedy noted in his concurrence in *Lucas*, "[t]he potential for future relief does not control our disposition, because whatever may occur in the future cannot undo what has occurred in the past. . . . [The Beachfront Management Act] may have deprived petitioner of the use of his land in an interim period. If this deprivation amounts to a taking, its limited duration will not bar constitutional relief. It is well established that temporary takings are as protected by the Constitution as are permanent ones." *Id.* at 1032-33 (Kennedy, J., concurring) (citing *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318 (1987)).

II. The Court Below Erred in Holding That a Temporary Planning Moratorium Cannot Constitute a Temporary Taking.

This Court in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), held that "temporary takings which, as here, deny a landowner all use of his property, are *not different in kind* from permanent takings, for which the Constitution clearly requires compensation." *Id.* at 319 (emphasis added). In so holding, the Court recognized several different factual scenarios upon which a "temporary" taking might be established.

First, the Court recognized that a temporary taking may arise when the government "temporarily exercise[s] its right to use private property," constituting a temporary physical taking. *See Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949) (determining just compensation for temporary physical occupation of laundry to provide laundry and dry cleaning service for members of the armed forces); *United States v. Petty Motor Co.*, 327 U.S. 372, 378 (1946) (holding that the taking of a leasehold, even

though temporary, required just compensation since "[i]f any property is taken, compensation is required"); *United States v. General Motors Corp.*, 323 U.S. 373 (1945) (holding just compensation due for the government's temporary use a specially equipped warehouse held under long-term lease). "'In such cases compensation would be measured by the principles normally governing a taking of a right to use property temporarily.'" *First English*, 482 U.S. at 318 (quoting *United States v. Dow*, 357 U.S. 17, 26 (1958)). It is thus unquestioned that temporary physical takings are compensable under the Fifth Amendment.

Another instance when a temporary taking may arise, as the Court recognized in *First English*, is when the government imposes a regulation which deprives a property owner of all economically viable use of his property, and later, abandons enforcement of the regulation or acquiesces in a judicial declaration that the regulation effected an unconstitutional taking. The *First English* Court held that "[i]nvalidation of the ordinance or its successor ordinance after this period of time, though converting the taking into a 'temporary' one, is not a sufficient remedy to meet the

demands of the Just Compensation Clause." *Id.* at 319.

The *First English* Court did not hold, however, as the court below suggests, that a temporary taking may not arise when a regulation is only imposed for a finite period, such as the temporary planning moratorium in the present case. Indeed, the Court in *First English* held that the issue centered on whether all use of the property had been deprived: "[W]here the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *Id.* at 321.

Furthermore, similar to the moratorium imposed in the present case, the ordinance at issue in *First English* was an "interim" ordinance, passed in response to an emergency flood situation. The fact that the ordinance was labeled "interim" indicates that such ordinance would have been in effect only for a finite time period until a permanent ordinance could be adopted. The Court in *First English*, however, did not require the property owners to wait until a final ordinance was enacted, however, to find that a

compensable taking had occurred.

Further, while in theory, development moratoria are imposed for a finite time period, in reality, these moratoria may suspend development indefinitely. *See Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency*, 228 F.3d 998, 1001 (9th Cir. 2000) (denying petition for rehearing *en banc*) (Kozinsky, J., dissenting) ("[S]o-called temporary moratoria have a habit of living beyond their purported termination dates. In this case, a series of consecutive development moratoria has prevented the landowners from building any homes on their lots for two decades since the start of this litigation.").

Thus, a regulation that deprives a property owner of the use of his or her property for such a lengthy time period, or indeed indefinitely, is a taking of property under the Fifth Amendment, whether or not the regulation is imposed "permanently." This comports with the various cases in which lower courts have held that extraordinary delay by the government in issuing a permit or making a permitting decision may constitute a temporary taking. *See e.g.*, *Tabb Lakes. Inc. v. United States*, 26 Cl. Ct. 1334, 1352-54

(1992) ("In evaluating the reasonableness of . . . the permitting process . . . the key factor that the court must analyze is whether 'extraordinary delay' in the governmental decision-making process gives rise to a temporary taking."); *Dufau v. United States*, 22 Cl. Ct. 156, 163 (1990) ("The Supreme Court has suggested that 'extraordinary delays' in the process of government decision-making may give rise to a temporary taking claim.") (citing *First English*, 482 U.S. at 321; *Agins v. Tiburon,* 447 U.S. 255, 263, n.9 (1980)).

CONCLUSION

There is no basis under the Constitution for distinguishing between physical takings and regulatory takings with respect to a temporary takings analysis. The key question, therefore, in a regulatory takings case, should not be how long a regulation is imposed but rather, whether, due to that regulation, a property owner was deprived of all economically beneficial or productive use of his or her property. If a property owner is temporarily deprived of all economically beneficial or productive use of his or her property, then his or her property has been taken and he or

she must be compensated under the Fifth Amendment.

Respectfully submitted,

Nancie G. Marzulla
Brenda D. Smith
DEFENDERS OF PROPERTY RIGHTS
1350 Connecticut Ave., NW
Suite 410
Washington, DC 20036
(202) 822-6770

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In The

Supreme Court of the United States

TAHOE SIERRA PRESERVATION COUNCIL, INC., *ET AL.*,

Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY, *ET AL.*,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE INSTITUTE FOR JUSTICE IN SUPPORT OF PETITIONERS

RICHARD A. EPSTEIN
1111 East 60th Street
Chicago, IL 60637
(773) 702-9494

INSTITUTE FOR JUSTICE
*WILLIAM H. MELLOR
CLINT BOLICK
SCOTT BULLOCK
1717 Pennsylvania Ave., NW
Suite 200
Washington, DC 20006
(202) 955-1300

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF THE AMICUS CURIAE

The Institute for Justice is a nonprofit, public interest law center committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. Central to the mission of the Institute is strengthening the ability of individuals to control and transfer property and demonstrating that property rights are inextricably connected to other civil rights.

The Institute's brief is co-authored with Professor Richard Epstein of the University of Chicago Law School, one of the nation's leading authorities on property law. The Institute also filed along with Professor Epstein *amicus curiae* briefs in *Lucas v. South Carolina Coastal Council*, *Dolan v. City of Tigard*, *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, and *Palazzolo v. State of Rhode Island, et al.* before this Court. This brief presents the question of whether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the Takings Clause of the Constitution.

The parties in this case consent to the filing of *amicus curiae* briefs in support of their respective positions and a letter memorializing such consent has been filed with the clerk.[1]

---

[1] Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than *amicus curiae* Institute for Justice, its members, and its counsel made a monetary contribution to the preparation and submission of this brief.

ABBREVIATED STATEMENT OF THE CASE

Owing to the limited scope of this Court's grant of certiorari, it is not necessary to rehearse in any detail the ins and outs of this modern version of Bleak House, in which the actions of regional planning commissioners made the nineteenth-century English Probate Court appear the model of dispatch. All the plaintiffs in this suit are landowners of undeveloped plots of land located in the Lake Tahoe Basin. For nearly twenty years, they have fought an incessant battle with the Tahoe Regional Planning Agency (TRPA), which under a series of strategically timed development moratoria has refused to allow the construction of any new single-family homes on ordinary building plots located in the basin. At no time has TRPA simply and publicly acknowledged its evident mission, which is to achieve an indefinite and selective moratorium on new construction through a series of temporary restraints.

TRPA's prime justification for its steadfast refusal to permit development relates to the preservation of the pristine condition of Lake Tahoe. Owing to its high altitude and location, Lake Tahoe was in its natural state "oligotropic," which means that the Lake lacked the nutrients to support the growth of plant life. In consequence the Lake enjoyed a matchless clarity that has been long celebrated by Mark Twain and the citizens who live and work in the region. Owing to the development that has already taken place within the area, however, Lake Tahoe has undergone a process of "eutrophication" whereby plant life has flourished in the Lake, undermining its clarity. The source of that eutrophication has been the substantial increase in the level of nutrients in the Lake. The source of nutrients can be traced unambiguously to the past construction in the Lake Tahoe basin. As natural soil gives way to asphalt and concrete,

the ability of the land in the basin to absorb water necessarily is reduced. The increased runoff sweeps along soil and the nutrients found in soil. These nutrients in turn allow plant life to flourish within the Lake, reducing its overall clarity. The ban against new construction is intended to prevent an acceleration of this cycle.

The record contains no evidence of any measures introduced by TRPA that require any alterations of sites that have already been built up. The building moratoria have at most prevented an increase in the rate of runoff, but have done nothing to reduce the level of runoff attributable to construction prior to the imposition of the development moratoria. All of the burden of preventing further eutrophication of Lake Tahoe has thus been cast on those landowners who did not have the need, foresight or luck to build on their properties prior to the formation of TRPA. The question addressed by this Court thus becomes whether that *selective* imposition of burdens on a temporary basis counts as a taking of private property for which compensation is required under the Takings Clause of the United States Constitution.

SUMMARY OF ARGUMENT

This case raises two distinct issues. First, does a temporary restriction on all development rights constitute a taking of private property for which *prima facie* just compensation should be paid? If (as is the case) this first question is answered in the affirmative, then, second, has TRPA offered any justification that negates its prima facie obligation? TRPA relies on two possible justifications: first, to protect the condition of Lake Tahoe from further degeneration, and, second, to allow some breathing room for planning agencies to engage in "normal delays in obtaining building permits, zoning ordinances and the like," mentioned but not elaborated in *First English*

Lutheran Church v. County of Los Angeles, 482 U.S. 304, 321 (1987).

On the first question, the Ninth Circuit clearly erred when it gutted *First English* by holding that compensation is never required for any ordinance that from the outset purports only to impose temporary restrictions, even total restrictions, on land use. The Ninth Circuit offers no definition of how long a period of time counts as "temporary," save to say that temporary is shorter than permanent. Nor does it address the legal implications of repeated strategic, rolling and indefinite renewal of temporary restrictions. On its crabbed view, *First English* applies only when the state refuses to abandon an in-place permanent land use restriction after some court has declared it to be an uncompensated taking. As stated, the Ninth Circuit invites state agencies to engage in a wholesale evasion of the Takings Clause. On its view, if the state chooses to extend a "temporary" moratorium from ten to eleven years, it can do so without running afoul of the Takings Clause. But if a "permanent" ordinance is struck down after ten years of operation, then the state must pay compensation if it chooses to extend that ordinance's life for an eleventh year. The economic effects of these "temporary" and "permanent" ordinances are the same, but their constitutional consequences are polar opposites. Under the Ninth Circuit rule, states will find it all but irresistible to extend temporary ordinances rather than to cut back permanent ones. The correct view of the matter prevents this gutting of Fifth Amendment guarantees: any permanent or temporary restriction, however phrased or implemented, is every bit as compensable as the occupation of the land for the identical period of time.

Nor does TRPA have a police power justification for imposing the restriction without compensation. Here there is a genuine question as to whether paving over land within the basin counts as a nuisance. If not, then

the state has no justification for singling out these owners without compensating them for their losses. As all owners in the Lake Tahoe Basin benefit, all should have to share in the costs of keeping the Lake clear. Yet *even if* the paving over open land counts as a nuisance, as it well might, it does *not* follow that TRPA may saddle these plaintiffs with the full burden of its nuisance control measures. If new construction by the plaintiffs counts as a nuisance, then the existing homes, driveways and roads in the Tahoe basin necessarily count as *continuing* nuisances. Even if the state may expand its definition of nuisance law, it cannot selectively sanction the plaintiffs, who have as of yet done no wrong, while allowing the creators of the continuing nuisance to go scot-free. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960). TRPA's current practices represent a total breakdown of the political process by allowing local residents to put the entire burden of preserving Lake Tahoe on nonresident owners who are unable to protect their interests in the political process. *See Pennell v. San Jose*, 485 U.S. 1, 22 (1988) (Scalia, J.) (account of the weaknesses of the democratic politics in the context of rent control). Only the payment of compensation to the plaintiffs can equalize the burden of nuisance prevention between early and latecomers.

Nor can TRPA make out its second justification. The succession of development moratoria does not remotely resemble the "normal delays" needed to consider individual applications for permits and variances. Rather, it represents a comprehensive planning system that refuses to pass on individual applications at all. Even if these moratoria were covered, in this instance, the delays in question surely count as "excessive" and not "normal" in that there is no short-time period (e.g., one year) in which the administrative action must be completed.

ARGUMENT

I. The Various Issues in a Takings Case Must be Disentangled in order to Develop any Coherent Jurisprudence.

It has been widely agreed that few areas in constitutional law are as chaotic or ill defined as this Court's takings jurisprudence. This Court itself has frequently acknowledged that criticism in its own words. In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), sustaining New York City's landmark preservation ordinance, Justice Brennan wrote:

> While this Court has recognized that the "Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States*, 364 U.S. 40, 49 (1960), this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require the economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. See *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962).

The doctrinal confusion in fact cuts deeper because in many other cases the embedded quotation from *Armstrong* has received the categorical endorsement that Justice Black intended for it to have. Thus in the case closest to this one, *First English*, for example, Justice Scalia exhibited no tolerance or philosophical despair about organizing the law under the Takings Clause by writing: "It is axiomatic that the Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a

whole.' " *First English*, 482 U.S. at 318-19 (quoting *Armstrong*). And some opinions have quoted both the categorical version of the rule in *Armstrong* and its qualified rewrite in *Penn Central*. *See Palazzolo v. Rhode Island*, 121 S. Ct. 2448, 2465-66 (2001).

The only way out of this jurisprudential quagmire lies in developing a unified approach to the Takings Clause that takes into account the two recurrent themes that have thus far stymied comprehensive judicial treatment. The *first* of these is to preserve the parity among regulated individuals so that a runaway political process does not place disproportionate burdens on a vulnerable subclass of the population. The *second*, in this context, is to guarantee that important environmental interests are not overlooked by an unthinking and overzealous protection of private property interests. The former generates the impulse for equal treatment; the latter explains the importance for singling out *all* wrongdoers for special treatment.

We believe that this Court will be able to reconcile these twin objectives only if it disaggregates the initial question (has the government taken private property?) from the police power question (does the state have an environmental justification for its action?) so that each issue in sequence can receive its proper analysis. This approach simply imitates in the Fifth Amendment context the common practice of analysis elsewhere. Private lawsuits routinely divide multiple factors that bear on litigation between those elements the plaintiff must raise as part of the prima facie case and those which the defendant may introduce by way of an affirmative defense, so that each issue receives its due weight. On this view it is important not to "anticipate defenses" in articulating the prima facie, or to muddle together issues that should be kept analytically and legally apart.

Similarly, the First Amendment law involving the protection of freedom of speech is rarely regarded to be as chaotic as the law under the Takings Clause, largely because this Court has followed the procedure set out above. It first asks whether any particular regulation, tax or restriction counts as a restriction on the freedom of speech, and then, if that answer is in the affirmative, whether the restriction in question is justified as a means to prevent violence, defamation, obscenity, etc. *See, e.g., Miller v. California*, 413 U.S. 15 (1973) (child pornography); *New York v. Ferber*, 458 U.S. 747 (1982) (same); *Young v. Am. Mini Theatres*, 427 U.S. 50 (1976) (neighborhood preservation); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (indecency); *Va. Pharmacy Bd. v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976) (consumer fraud); *Dennis v. United States*, 341 U.S. 494 (1951) (public morality, or to preserve and protect national security). Once these legitimate ends are specified, it can then be determined whether the remedies imposed sweep too wide for their intended purpose.

One reason why the Ninth Circuit went so far astray in the instant case is that it consciously muddled these sets of issues together. It thus started with a detailed account of the strong environmental interests in the case so as to create the illusion that these interests would have to be slighted if *any* compensation were paid to the plaintiffs for their inability to build on their land for over a twenty year period. Yet the temporary takings issue does not arise only in environmental contexts, for it can also occur in ordinary zoning, traffic control or antigrowth ordinances that have little or nothing to do with environmental issues. It therefore is ill advised to prejudice the discussion of the takings issue by making it appear as though the recognition of the government's prima facie obligation to compensate necessarily short changes the environmental concerns. It is the burden of this brief to

show how the disaggregation of the two matters clarifies the analysis, gives due interests to both, and, in this case at least, requires that some compensation be paid to the plaintiffs *in order* to give the environmental interests their full weight.

II. A Temporary Taking that Deprives any Landowner of All Viable Economic Use of the Land is Prima Facie Compensable under the Takings Clause of the Constitution.

A. The Takings Clause Protects All Valid Interests in Real Property that are Created and Recognized under State Law.

It is widely understood that the federal constitutional law under the Takings Clause does not define the property interests in land and other resources that it protects. Rather the definition of these property interests falls typically (copyright and patents are exceptions) in the province of state law. *See United States v. Powelson*, 319 U.S. 266, 279 (1943); *United States v. Causby*, 328 U.S. 256, 266 (1946); *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1001 (1984) (using state definitions of trade secrets). The dominant characteristic of English and American Law is its flexibility. The fundamental form of ownership under Anglo-American law is the fee simple absolute in possession that was traditionally seen as conferring on its owner rights that extend over all times from the bowels of the earth to the edges of heaven. (*Cujus est solum, ejus est usque ad coelum et ad inferos*, translated as whosoever owns the land, owns to the heavens and to the depths.) Putting aside the obvious qualifications for air rights, *see Causby*, 328 U.S. 256, this unitary fee simple interest is capable of division in a large (but not unlimited) number of ways. For these purposes, the simplest variations on the doctrine of estates illustrate the basic flexibility of Anglo-American property law. The private law allows

individuals to divide land over the plane of time, such that one person holds a life estate while a second holds a reversion or remainder, or one person holds a lease and the other a reversion or remainder. It is also possible to create "servitudes" (covering both easements and restrictive covenants) that give one landowner interests in or over the land of a neighbor. *See Restatement (Third) of Property, Servitudes* (Tentative Draft No. 5, 1995). For a defense of the unified approach, *see* Susan F. French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. Cal. L. Rev. 1261 (1982).

So long as these interests are validly created under state law, they are protected under the Takings Clause. Suppose that the fee simple in Blackacre is worth $100,000, but is then divided by deed into a life estate worth $60,000 and a remainder interest worth $40,000. Everyone agrees that the government has to pay $100,000 if it condemns the land before it is divided into the life estate and remainder. Accordingly, it has to pay each holder for its respective interest after the division. It would be inconceivable that the Takings Clause could provide full compensation for the protection of the fee, but *no* protection to either the life tenant or the remainderman, or the tenant and his landlord, once the property is divided in accordance with the settled principles of state law. Rather, a landowner's ability to alienate and use property under state law is only preserved if the state pays each holder of an estate in land the value of his or her interest. *See Palazzolo*, 121 S. Ct. at 2463 (noting the importance of alienability of interests in land); *see also* Victor Goldberg, Thomas W. Merrill & Daniel Unumb, *Bargaining in the Shadow of Eminent Domain: Valuing and Apportioning Condemnation Awards Between Landlord and Tenant*, 34 UCLA L. Rev. 1083 (1987).

The same analysis of divided property applies when the government takes part of the landowner's undivided

fee interest in land. In *Causby*, the question before this Court was whether the United States had to pay for the damages caused to plaintiffs' property by repeated low-level overflights. In allowing the action, the Court recognized that the overflights took an *easement* over the plaintiff's property, for which it was required to pay not only for the space so occupied but also for all the consequential damages done to the plaintiff's *remaining* land holdings. The government sought to limit damages because the

> "enjoyment and use of the land are not completely destroyed. But that does not seem to us to be controlling. The path of glide for airplanes might reduce a valuable factory site to grazing land, an orchard to a vegetable patch, a residential section to a wheat field. Some value would remain. But the use of the airspace immediately above the land would limit the utility of the land and cause a diminution in its value." *Causby*, 328 U.S. at 262.

No requirement of a total wipeout, anywhere. The landowner does not receive protection only in the event that the fee simple is taken away root and branch. He receives protection for the taking or destruction of any fractional interest. "It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken." *Id.* at 261, *cited in First English*, 482 U.S. at 319.

The principle that applies to easements applies with equal force to term interests in property. In *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949) (Frankfurter, J.), the government had requisitioned property for government use for an indefinite period during the second World War. The occupation of the property was both temporary and indefinite, but neither of these factors alone, nor in combination, denied the owner of the property compensation for the rental value during the period

of government occupation.[2] The government had the option to decide whether to take the property over in a single transaction, or to extend its occupation day by day. It chose the latter because of the uncertain duration of the war. But this power to determine the scope of its taking did nothing to defeat its obligation to compensate.

Kimball Laundry and its companion temporary takings cases, *see United States v. Petty Motor Corp.*, 327 U.S. 372 (1946); *United States v. Gen. Motors Corp.*, 323 U.S. 373 (1945), were explicitly relied on in *First English* to justify the state's prima facie duty to compensate when government regulation restricted all right to use the property for a limited period of time. That judgment was simply an extension of the familiar equivalence in this Court's jurisprudence whereby compensation is required for any government restriction that precludes all economically viable use of the property in question. *See Lucas v. S.C. Coastal Çomm'n*, 505 U.S. 1003, 1015-16 (1992). In dealing with the fee simple, this Court has refused to draw any distinction between a total restriction on land use and a government occupation. *First English* preserved that equivalence for temporary periods of use.

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[2] The decision also refused to compensate the lessee for the loss of good will attributable to the government occupation on the grounds that this was only destroyed but not taken by the state. That conclusion seems flatly wrong as a matter of principle, if only because good will is itself a recognized form of property under state law. The mere fact that it was "destroyed" but not "taken" does not distinguish the case from *Causby*, which clearly did allow for consequential damages.

B. The Ninth Circuit's Continued Attempts to Evade the Command of First English are Unavailing.

The Ninth Circuit invoked a number of dubious stratagems in order to resist the clear direction of *First English*. Its first line was to note that *First English* itself asks the question "whether abandonment by the government [of a regulation declared to be a taking of the fee simple] requires payment of compensation for the period of time during which regulations deny a landowner all use of his land." 304 U.S. at 318, *quoted in Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 778 (2000). From this articulation of the question, the Ninth Circuit then concluded that *First English* does not apply here because TRPA had never imposed a permanent moratorium on development for it to abandon.

The fatal flaw in the Ninth's Circuit reasoning lies in its undue stress on the particular fact pattern in *First English* while neglecting its basic message. The loss to the landowner is, as a first approximation, the same whether the restriction in question was initially imposed for a definite period of time or as a permanent regulation. A temporary regulation creates residual uncertainty because it can be extended. A permanent restriction leaves a residual uncertainty because it can be lifted. But either way the interim loss of use values remain the same, and so too the uncertainty imposed on the private ability to plan. The difference between the two systems of land use regulation is no greater than the ephemeral difference between a bonus for early payment or a penalty for later payment, when in each case the former costs $90 and the latter $100.

The government occupations of land in *Kimball Laundry*, *Petty Motor*, and *General Motors* were also all temporary from the outset, but that hardly made them noncompensable. Only the mode of payment changed, for

the government-as-tenant paid rent on a periodic basis for the period of use instead of a single lump sum. Nothing about the difference between physical occupation and economic regulation limits *First English* to abandonment cases. Thus in *Lucas*, Justice Scalia matter of factly described *First English* as "holding that temporary deprivations of use are compensable under the Takings Clause." And so it does.

The Ninth Circuit sought to add a philosophical patina to bolster its conclusion by noting that the alternative view of the matter requires the Court to engage in what has been termed a "conceptual severance" of the fee simple into its component parts. *See* Margaret Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 Colum. L. Rev. 1667, 1674-78 (1988). The basic argument is that the plaintiff seeks to "sever," at least in theory, the present from the future interest, so that it becomes "the" property subject to a taking by the state.

This hypothetical severance – no plaintiff in this case actually sought to divide his property over time – receives heightened but undeserved attention only because this Court's case law makes the question of compensation turn on the comparison between the quantum of the interest the state takes and the quantum of interest the landowner held prior to the regulation. Compensation is awarded when the entire interest is taken, but not when the landowner retains enough to continue to make viable use of "the" property.

This before-and-after comparison received its most important judicial expression in *Penn Central*, when this Court held that the plaintiffs were not entitled to recover for the loss in value of the air rights over Grand Central Station imposed by New York City's landmark preservation program. Justice Brennan held that the air rights had to be treated as part and parcel of the fee simple for the

entire plot by declaring, without explanation, that "[t]akings jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." 438 U.S. at 117-18. What matters is the disposition of the "parcel as a whole," in that case the entire landmark site. *Id.* Hence so long as Penn Central could continue to undertake all preexisting uses at a profit, as by the continued operation of its terminal, it could not show that it had been deprived of all economic use of the parcel in question. If, however, it could treat the air rights as though they had been sold off to a third party, thus forming a separate item of property (as they would be under state law), then compensation would be required because these (narrowly defined) air rights would have lost their entire use value, even if the use of the Grand Central Station, conceived separately, remained unchanged.

The need to define the contours of the property subject to regulation is often referred to as the "denominator" problem. *Keystone Bituminous Coal Ass'n v. deBenedictis*, 480 U.S. 470, 497 (1987) (citing Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1192 (1967)). Once it is known what is lost, then it is important to determine whether it is "the" property or part of a larger whole for which it counts as a smaller fraction. The Ninth Circuit's belief was that the fee simple sets the denominator, for which the temporary life estate counts only as a small fraction. It thus extended the *Penn Central* rule for spatial segmentation to temporal segmentation.

The errors in this position are numerous. We have set many of these out in our previous amicus curiae brief in *Palazzolo v. State of Rhode Island*, at 26-30, and will not repeat all the nightmarish problems that arise when the

government seeks to amalgamate several undeveloped parcels into a single whole to take advantage of the *Penn Central* rule. It is important to note in this context, however, that the Ninth Circuit sugarcoats the matter by claiming the taking is temporary so the associated loss is small, such that once the temporary restriction is over the landowner can go about his business. The obvious rejoinder is that the financial deprivation is a function of both the value of the underlying property and the duration of the temporary restrictions. The general rules of discounting, as applied to land valuation, make it crystal clear that the loss of the use of land today cuts much more deeply than the like loss of the use of the land twenty years from now. Take a plot of land worth $100,000. With a discount rate of 3 percent per year, then a three year moratorium reduces the value of the property by at least $9,000; the twenty year moratorium reduces its value by $46,000; raise the discount rate to 4 percent, and those numbers become about $12,500 for the three year deprivation and about $53,000 for the twenty year deprivation. Even these calculations understate the risk to the landowner. Uncertain delays make it harder to plan the ultimate development of the land, and expose the owner to the costs of litigation that are nowhere compensated under the law.

Nor is the argument against compensation strengthened by noting that a proper analysis of the Takings Clause should guard against strategic behavior – acting inconsistently with one's true preferences in order to obtain some short-term collateral advantage. *See Palazzolo*, 121 S. Ct. at 2477-78 (Breyer, J., dissenting). The ostensible concern is that landowners might consciously divide their holdings in order to increase the odds of getting compensation from the state. Yet nothing of that sort happened here at all, for *none* of the 400 plus plaintiffs in this case have made a temporal division of their

land to bolster the claim that some retained term interest was "the" entire property.

Strategic behavior is, moreover, a two-edged sword. This Court struck down the effort of Rhode Island to engage in strategic behavior by announcing its wetlands restrictions before Palazzolo acquired his property, in an involuntary distribution no less. *See Palazzolo*, 121 S. Ct. at 2462-64. Similarly, in this case, the party trying to game the legal system is TRPA. It knows that it cannot declare a permanent moratorium on new development without having to pay compensation under the Takings Clause, so it has for twenty years engaged in its own actual regulatory severance by imposing a bewildering succession of temporary moratoria. It was just this dreadful prospect that led the Court in *First English not* to follow the principle for spatial segmentation that was laid out in *Penn Central*, and nothing in the last fourteen years should lead this Court to deviate from this result.

More generally, the only possible way to deal with the dangers of strategic behavior on all sides is to follow the rule that requires the state to pay full value to the party who holds the interest at the time of the condemnation. To return to *Penn Central*, suppose that the air rights had been sold off years before New York announced its landmark preservation ordinance. Does one treat the prior sale as though it were strategic, and deny compensation to the holder of the air rights because the Penn Central Company can still make use of Grand Central Station? That rule places a powerful crimp on the ordinary alienation of land by leaving the buyer defenseless against future regulation. As noted earlier, the compensation owed by the state should neither increase nor decrease, solely because the air rights have been transferred when the ground rights have been retained. The right result can only be achieved if the air rights receive full compensation whether they are linked to or severed

from the ground rights. Under that rule, the only time that the owner of the fee will sell the air rights is if they are worth more (after transactions costs) to the buyer than they were to himself – a value-maximizing transaction that the law wishes to protect. The concern of conceptual severance is, ironically, correct to the extent that it counsels that private parties should have no incentive to rearrange property rights solely to up the level of compensation received. But that result is achieved only if the property interest is fully compensated whether the interest is retained or rejected.

Penn Central is not only wrongly decided, we believe, but it also stands, as the Ninth Circuit rightly perceived, in mortal tension with both *First English* and such earlier cases as *Causby* and *Kimball Laundry*. The most glaring anomaly in the law of takings generally is why this Court should treat the tiniest physical occupation as a categorical taking generating a well-nigh per se obligation to compensate, *see Loretto v. TelePrompter*, 458 U.S. 419 (1982), while land use restrictions that devastate the value of property are judged by a far less restrictive standard. It cannot be unraveled by overturning *Loretto*, for then the Takings Clause becomes a dead letter. But the anomaly can be extirpated by overturning *Penn Central*, so that the greater the government intrusion, be it by taking or regulation, the greater the presumptive obligation to pay.

Overturning *Penn Central* brings the Takings Clause into harmony with the private law of property, where the distinction between physical occupation and land use restrictions has no resonance. There both easements, which authorize entries that would otherwise count as trespasses, and restrictive covenants, that render unlawful otherwise permissible uses, are treated as property interests. These interests are both subject to recordation; they run with the land, and they afford their owners both

monetary and injunctive relief; and they are both protected against state condemnation. So long as federal takings law takes its cue from the state law of private property, the categorical distinction that *Penn Central* seeks to erect between easements (that invade) and covenants (that restrict) land use cannot be justified by insisting, falsely, that the level of dislocation from the government action is greater with the physical occupation of a tiny corner of one's property for a day than for a comprehensive moratorium that lasts for years.

Nor is there any intelligible way to rank permanent partial restrictions on land use (e.g., zoning restrictions) as either more, or less, severe temporary total restrictions, such as those found here and in *First English*. It all depends on the facts. Sometimes the partial permanent restriction will bite more deeply into the landowner's common law rights than the total temporary restriction, and sometimes not. This Court's recent decision in *Palazzolo* noted the intellectual "discomfort" with the entire denominator conception. 121 S. Ct. at 2465. The time has come for removing the discomfort by transforming the analysis. The key to understanding the overall problem lies in the general approach of *First English*, namely, that in takings cases what matters is the interest that is taken, not that is retained by the owner. The size of the original bundle of rights is neither here nor there, unless it can be shown that the taking of one portion of the land serves to increase (as by access to a new public road) or decrease (as by noise or pollution) the value of what is retained.

Justice Stevens in his *First English* dissent noted that property can be measured over three dimensions, space, use and duration. *See First English*, 482 U.S. at 330, *paraphrased in Tahoe-Sierra*, 216 F.3d at 764. *See also* Judge Kozinski's dissent of the denial of the en banc petition for rehearing. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 228 F.3d 998, 999 (9th Cir. 2001) (noting

that the Ninth Circuit rejected sub silento *First English*). The *only* correct inference to draw from his observation is that *any* diminution along *any* dimension of ownership is prima facie compensable. That position does *not* entail that any change in market value attributable to changes in the local environment is subject to compensation. It only implies that whenever the state *takes* a stick from the bundle of rights, it should compensate for the loss unless it can show some justification for its action.

The stakes here are high. The consistent application of this position would require overturning the outcome in *Penn Central* to the extent that it held that the loss of air rights did not give rise to a prima facie right of compensation. Yet that result would be welcome because it would end the discontinuity between that case on the one hand, and *First English, Kimball Laundry* and *Causby* on the other. Overruling *Penn Central* on this point, as a selective imposition of an improper system of "spot zoning" removes the disproportionate impact on isolated owners in manner as Justice Black's maxim in *Armstrong* requires. *All* partial takings by way of land use restriction should be subject to the same prima facie rules for compensation as a physical occupation for a limited period of time. The *First English* case held that for temporary total takings. At the very least, nothing in *Penn Central* diminishes *First English*'s continued vitality. And *First English*'s vitality calls for overruling *Penn Central*.

III. The Police Power Justifications for the State, While Present in this Case, do not Justify a Disproportionate Burden on These Plaintiffs.

A. This Case Raises Police Power Issues Dramatically Different From Those in First English.

Thus far this brief has argued that the temporary total land use restrictions in this case should be regarded

as prima facie compensable under the *First English* rule. The question then arises whether the state can justify the restriction in question. This issue also arose in *First English* itself, where the state claimed public health and safety justifications for preventing the rebuilding of the flooded land. The plaintiff in that case sought to parry the force of this argument by alleging that the initial flooding had resulted from government policies that created dangerous conditions on upstream waters. *See First English*, 482 U.S. at 308. But once that tort claim was rejected as resting on what was adjudged an untenable strict liability theory in tort, *id.* at 309 n.3, then little was left to the plaintiff's case. On remand, the California Appellate Court treated the flooding as caused by an act of God, and accordingly had little difficulty in holding the County justified in preventing the reconstruction of the facility to protect disabled children who might use it. *First English Evangelical Lutheran Church v. County of Los Angeles*, 258 Cal. Rptr. 893, 210 Cal. App. 3d 1353 (1989). *First English* thus never raised the question of whether the plaintiff's conduct could be restricted on the grounds that it created a nuisance that could harm others.

This case presents radically different issues. No one could claim that any restrictions on new construction are necessary to protect the lives of the prospective occupants. Rather, the entire case turns on the question of whether the construction of additional homes would create a nuisance to public waters. In allowing plaintiffs some recovery, the District Court relied on decisions of California courts that held that the tort of nuisance required an actual *discharge* of waste or harmful substances by the plaintiff onto public lands or waters or the private lands and waters of others. *See* Appendix to Petition for Certiorari at 120-26 (citing, e.g., *Joerger v. Pac. Gas & Elec. Co.*, 207 Cal. 8, 276 P. 1017, 1025 (Cal. 1929)).

No one questions that cases of discharge, especially of filthy or noxious substances, count as the core cases of nuisances that can be enjoined, without compensation, under the state police power. Here, if *one* person is solely responsible for the discharge, the law *should* come down on the perpetrator alone, so that it would be grotesque to allow him to claim that he has been singled out for special treatment in violation of the *Armstrong* principle. He has singled out himself for the harsher treatment that he deservedly receives.

The instant case, however, differs from the canonical nuisance cases cited below in two ways. First, it does not involve any discharge of waste materials into public waters. Rather, it asks whether the defendant has created a nuisance by paving over the land, without discharging any substances into public waters. Second, the following question arises whether or not this broad account of nuisance is adopted: *which* of the many individuals who have built, or might build, in the Tahoe basin should bear the responsibility for the improvement of the condition of Lake Tahoe? The District Court focused exclusively on the first, and could not find any California precedent that extended the idea of nuisance to cover this case. It then followed the instructions of *Lucas*, which stated:

> we believe similar treatment must be accorded confiscatory regulations, *i.e.* regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already placed upon land ownership. *Lucas*, 505 U.S. at 1029.

Lucas then continued:

> The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition (though changed circumstances or new knowledge may make what was previously permissible no longer so), see [Restatement (Second) of Torts], § 827, Comment *g*. So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant." *Lucas*, at 1031.

The District Court found only one long-term statutory provision that met these requirements, the state's statutory definition of a nuisance,[3] which by any fair reading does not appear, as it concluded, to cover the situation presented here. But as a matter of tort theory the District Court's conclusion of no nuisance is not ironclad, for a respectable case could be made for the proposition that the paving and building over the ground should, in light of the external harms (none of which were alleged or plausible in *Lucas*), be treated like a nuisance, subject to the state police power. Arguably, the situation comes quite close to the general rule in *Rylands v. Fletcher*, L.R. 3 H.L. 330 (H.L.E. 1868), which holds a party liable for harm caused when substances a landowner "brings, keeps or collects" on his own land escape. To be sure, no homeowner has captured water in a reservoir that leaks. But some weight could be properly

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[3] "Anything which is injurious to health . . . or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal or basin, or any public park, square, street or highway, is a nuisance." Cal. Civ. Code § 3479, *quoted in* Appendix to Petition for Certiorari at 120. For the analogous provision, *see* N.R.S. 40.140(1), *quoted in* Appendix at 125.

attached to the decision of any landowner – public or private – paving over open land so as to divert water that would otherwise be collected or absorbed onto the plaintiff's land in ways that do harm. That rule would substantially extend liability as it is currently found virtually everywhere in the United States, for leaking reservoirs are something of a rarity, but asphalt highways and driveways are not. It is difficult to hazard a guess in the abstract as to what kind of ordinance or liability rule regulating paving and similar activities should pass muster under the police power, when state actions are examined, as we believe they should be, under an intermediate standard of scrutiny. But in our view, there is surely a substantial possibility that the state could remain within the confines of "background" common law principles, as construed in *Armstrong* and *Lucas*, by adopting a general rule of tort liability for these activities, or by imposing well-tailored nondiscriminatory administrative limitations on this conduct.

B. Whether or not Paving Over Open Lands Constitutes a Nuisance, these Plaintiffs Should not be Required to Bear the Full Costs of Protecting Lake Tahoe without Receiving Just Compensation.

The uncertainty in the definition of a nuisance only addresses one part of the *Lucas* police power analysis, which to our knowledge has never been systematically applied to cases of joint behavior by multiple landowners. In the case where the state seeks to enjoin one landowner from certain activities, the question of whether his activity rises to a level of a nuisance becomes decisive under *Lucas*. Fortunately, in the context of joint activities, it is no longer necessary to decide whether state common law or statutes have, or should, extend their conception of nuisance law. Somewhat surprisingly,

in this context of multiple independent landowners, compensation is required in both cases to counteract, as *Armstrong* and *Lucas* require, the disproportionate impact of state regulation on *similarly situated individuals* that *Lucas* condemns. The gist of the matter here is that these plaintiffs are denied the identical uses allowed to other parties who have been fortunate enough to build on their sites before TRPA passed its restrictive legislation. In line with *Armstrong* some adjustments must be made to rectify the injustice of forcing one class of innocent owners to bear the entire burden of those precautions introduced in order to protect the water quality of Lake Tahoe from further degradation, even if their activities fall into the nuisance category. It is therefore useful to analyze the police power of TRPA's state first on the assumption that paving over natural terrain does not constitute a nuisance, and then on the assumption that it does.

To structure the analysis, begin with a simplified model in which 100 identical plots of land surround Lake Tahoe. Assume further that construction on any given plot of land increases the runoff and thus reduces the water quality in the Lake, but does *not* constitute a nuisance. In principle the social objective for this community is to allow construction until the marginal social cost of building on an additional plot, including the overall negative impact on the Lake, is greater than the marginal benefit from that additional construction. In the absence of regulation, each landowner will tend to ignore the decrement that his construction will have on the quality of the Lake. In the early stages, these costs may well be low so that the construction makes sense from a social point of view. But the harm is likely to increase with each additional unit constructed, so that we can reach some maximum level of permissible construction. That judgment rests on a mixture of political and scientific considerations sorted out by legislative or administrative

determination. Solely for the purposes of exposition, we assume that it allows for the construction of single-family homes on 60 percent of the plots.[4]

In a world in which no one has undertaken any construction, the best method for development is to auction off the building rights so that they go to those who value them most, and then to divide the total proceeds received among those individuals who are denied the right to build. That system allows for (1) the optimal level of construction as determined by environmental considerations, (2) the efficient selection of the sites on which construction takes place, and (3) compensation to the nonbuilders who therefore are spared disproportionate impact. The bidding system thus allows for both the equitable division of the burden and for a full realization of the environmental interests. It also conforms with the dicta in *Lucas* that call for compensation when one group of individuals is denied the development rights granted those who are similarly situated.

In this case, however, some of the units have been built before restrictions have been put in place. It is no longer possible to adopt a bidding system to allocate the development rights where they are valued the most. But it is possible to require the side payments to the extent that TRPA now decides by fiat to impose the entire burden of environmental protection on those individuals who have yet to build so that local residents can continue to enjoy the beauty of the Lake. The correct solution therefore is to impose a tax on those who have developed their lands to compensate the others for the loss of their development rights, be they great or small. If it is argued

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[4] Ironically, a better approach might well call for the construction of some multi-family dwellings, which would reduce the level of ground covered for each new resident. We put such complications aside here.

that the benefits of preserving Lake Tahoe extend beyond its immediate users, then the states of California and Nevada could chip in some additional funds to reduce the burdens on local residents who have already built. This regime will force current homeowners (and the two states) to decide just how much they value the purity of Lake Tahoe because now they must pay for whatever benefits they receive. We thus have a system that respects environmental objectives without imposing undue burdens on a select and vulnerable portion of the population. This system is far preferable to one that allows the dominant faction to keep all the benefits of their own homes while denying all other landowners, without compensation, the prospect of building at all.

Now suppose, however, that the plaintiffs would have created a nuisance by paving over their open land. It still follows that they should be compensated for keeping their lands open. Once the definition of nuisance is expanded to catch the plaintiffs, then it has to be expanded, in line with *Armstrong* and *Lucas*, across the board. Accordingly, it follows that all existing owners of built-up land have committed continuing nuisances that have caused harm to Lake Tahoe, and will be allowed to wreak damage without limitation in the future. The question then arises, what should be the fair allocation of burden among these parties. According to TRPA, *all* of the burden of precautions should be cast upon the plaintiffs, even though *all* the previous damages have been caused by the established homeowners within the area. The adoption of this one-sided rule invites unwanted strategic behavior by encouraging premature (and harmful) development of land in order to gain a priority over one's neighbor. Of course, it may be costly and counterproductive to rip down one house in order to build another. That said, the appropriate remedy is to tax those

individuals who have, by hypothesis, committed nuisances in order to pay the compensation that equalizes the burden between them and their neighbors.

Some differences still remain between the nuisance and the nonnuisance scenarios, but they do not go to the compensation question. Thus if all defendants have committed a nuisance, then there is less warrant for asking California and Nevada to contribute funds raised from general revenues to ameliorate the danger. All of the burden could be placed on those homeowners responsible for the damages. Similarly, if a single landowner held title to all the land around the basin, then under *Lucas*, TRPA could enjoin his operations without the payment of compensation if that activity were adjudged a nuisance, but not if it were found to be a lawful use of property. It follows therefore that even the most systematic exposition of takings law leaves some hard cases close to the edge of the police power, for just as there are borderline cases under the private law of nuisance, so too are there under the police power that is parasitic on these private law conceptions. But none of those complications matter in this case, for whether we treat new construction as lawful or tortious, there is no warrant favoring those who have done everything to create and nothing to abate the condition in question. Compensation should therefore be paid to these plaintiffs for their loss.

IV. The Need for Orderly Planning does not Justify the Endless Delays Imposed in this Case.

The only issue that remains for discussion is the scope of *First English*'s observation that its holding did "not deal with the quite different questions that would arise in the case of normal delays in obtaining permits, changes in zoning ordinances, variances, and the like." 482 U.S. at 321. Initially, nothing in *First English* covered

temporary moratoria, and that upholding any constitutional claim against government necessarily limits the reach of government discretion. *Id.* at 321-22. Nor is it improper to clip the wings of planning authorities. These groups respond to the pressures of local residents, not those absentee landowners who do not vote in local elections. Strategic delay allows the locals to achieve their goal without paying their way. The dangers of faction and bias can only be countered by giving the outsiders the protection of a nondiscrimination rule (similar to that adopted in this Court's dormant commerce clause jurisprudence) to offset the outcomes of political processes in which they do not fully participate. Here the plaintiffs do not ask for any special treatment; they only do not want to be subject to discrimination that favors those privileged homeowners as against themselves. The disproportionate impact test does not tell the local powers how much environmental protection to demand. It only tells them that they cannot cast the entire burden of protection on a select group of individuals who have yet to build at all.

This entire scheme of checks and balances would be undercut if planning authorities could cloak their decisions to exclude in endless deliberations and reviews. The use of the term "normal" delays in *First English* shows that this Court was alert to the possibilities of abuse. Drawing the line between normal and excessive deliberation is, however, a daunting task. This problem is not acute when all the parties to the dispute are similarly situated, for then each shares a pro rata portion of benefits and costs. But in cases like the present, where the distribution of benefits and burdens is manifestly skewed, everyone knows that delay works for the benefit of one group and one group only. Accordingly, when the current positions are so skewed, the best result is to

require periodic compensation to those bound by temporary restrictions along the lines of *Kimball Laundry*. Once the regulations are finalized then a more complete reckoning is possible.

In the alternative, if this privilege is recognized even when the burdens of its implementation are skewed, then it should be strictly limited. Tests that balance one factor against another are not worth the candle, and invite endless rounds of litigation on collateral issues. The better approach by far is to allow a short fixed period for deliberations to take place without compensation – say, maximum one year – after which the just compensation requirements under the disproportionate impact test should kick in as described above. This case goes so far beyond the pale that no matter what the ultimate rule going forward, the defendants should not receive any protection under it in this case.

CONCLUSION

For the reasons stated above, the decision of the Ninth Circuit should be reversed, and the case remanded for a determination of the level of just compensation owing to the plaintiffs for the temporary taking of their lands.

Respectfully submitted,

RICHARD A. EPSTEIN
1111 East 60th Street
Chicago, IL 60637
(773) 702-9494

INSTITUTE FOR JUSTICE
*WILLIAM H. MELLOR
CLINT BOLICK
SCOTT G. BULLOCK
1717 Pennsylvania Ave., NW
Suite 200
Washington, DC 20006
(202) 955-1300

Counsel of Record

(12)

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2000

TAHOE-SIERRA PRESERVATION COUNCIL, *et al.*

Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Brief *Amicus Curiae* of
American Association of Small Property Owners, *et al.*
in Support of PETITIONER
(Complete List of Amici Appears on the Inside Cover)

MARTIN S. KAUFMAN*
* Counsel of Record

Atlantic Legal Foundation
205 East 42nd Street, 9th Floor
New York, NY 10017
(212) 573-1960
Counsel for Amici Curiae

31 pp

Complete list of *amici curiae*:

American Association of Small Property Owners
Apartment Association of South Central Wisconsin
American Land Rights Association
Apartment Owners Association
of Southern California, Inc.
Berkeley Property Owners Association
Chicago Creative Investors Association
Genessee Landlord Association
Georgia Real Estate Investors Association, Inc.
Greater Dayton Real Estate Investors Association
Illinois Rental Property Owners Association
Ohio Real Estate Investors Association
Property Owner's Association of Greater Baltimore
Property Owning Women
Real Estate Investors Association of Cincinnati
Real Estate Investors Association of Toledo
Suncoast Real Estate Investors Association, Inc.

Motion for Leave to File Brief *Amicus Curiae* of American Association of Small Property Owners in Support of Petitioner Out of Time

Amici curiae American Association of Small Property Owners, *et al.* hereby move this Court for leave to file a brief *amicus curiae* in support of Petitioner out of time.

Amici expect to file their brief on September 19, 2001, one week after Petitioners' brief on the merits was due to be filed.

The delay in filing the brief of *amici* results from the tragic events of September 11, 2001, which has caused serious disruption to communications and the work of counsel for *amici*, who are located in New York City.

Wherefore, *amici curiae* move for permission to file their brief in support of Petitioner on or before September 20, 2001.

Dated: New York, New York
September 18, 2001

Respectfully submitted,
MARTIN S. KAUFMAN
Counsel of Record
Atlantic Legal Foundation
205 East 42nd Street
New York, New York 10017
212-573-1960

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INTEREST OF *AMICI*

Amici are organizations from throughout the United States whose purpose is to represent the interests of small property owners, through education, interaction with legislative and regulatory bodies, and through legal proceedings. They believe that this case is important to their constituents because it represents an opportunity for this Court to clarify the principles embodied in the Bill of Rights for the protection of the rights of individuals, specifically their right to use and enjoy their property. A description of each of them is found in the Addendum to this brief.

This brief is submitted in support of the petitioners, and we urge the Court to reverse the judgment of the Court of Appeals for the Ninth Circuit.[1,2]

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[1] Counsel for the parties have consented to the filing of *amicus* briefs by letter dated September 4, 2001, and filed with the Clerk of this Court.

[2] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that this brief was not prepared, written, funded or produced by any person or entity other than *amici curiae* or their counsel.

INTRODUCTORY STATEMENT

Amici believe that the facts of this case, as cogently stated by petitioner, demonstrate that there has in fact been a permanent ban on all productive use of petitioners' land.[3] *Amici* urge, however, that whether the cessation of development is characterized as "temporary" or "permanent" is immaterial, and that *all* regulations that prohibit otherwise lawful use of property (apart from "normal delays" inherent in threading through the land use regulatory process) are compensable takings under the Fifth Amendment.

Amici assume that the moratoria at issued were adopted for a genuine and sound public purpose. There is no dispute that TRPA had a legitimate concern, and that it was within its discretion to make a policy choice to halt all development in "sensitive" zones around Lake Tahoe to preserve the lake's "pristine" character.

The issue is simply whether a public agency, acting for the public benefit, may shift the financial burden of its decision to stop development to the shoulders of the property owners directly affected, or whether the public at large must pay the price of that policy choice.

Amici represent small property owners, who often suffer particularly harsh economic injury when prevented from using their property; in most cases they are too small, and with too limited

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Petitioners demonstrate that they have been prevented from building on their properties by a series of rolling prohibitions imposed by the Tahoe Regional Planning Agency ("TRPA" or "respondent"); there were four formal "moratoria" and a number of informal ones, the effect of which has been a complete prohibition of any economic use of petitioners' land since 1981. TRPA has blocked petitioners' construction of homes for two decades and that prohibition in fact has become permanent. Petitioners' property cannot be used productively. The owners' "Hobson's choice" is to continue to pay taxes on their useless property or to sell at distress prices.

resources, to challenge governmental abuses of "temporary" moratoria; they are too closely held and too cash poor to spread the cost of, or wait out, "temporary" development bans which, as in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), last two years, let alone those which, as in this case, last two decades.

SUMMARY OF ARGUMENT

The use and enjoyment of private property is a fundamental right, and important to a democratic society. The takings clause was designed to protect this core value.

This Court has long recognized that limitations on the exercise of rights in private property are as much "takings" as are physical invasion of property. Government regulation tends to become ubiquitous, and government constantly develops new and artful ways to appropriate rights to use and enjoy private property for the "public good." Unless constrained by a requirement to compensate owners of private property, in a majoritarian system, government agencies will allocate disproportionate burdens of achieving public purposes to politically weak segments of the citizenry.

Temporary development moratoria, if not clearly and closely limited in duration, work significant hardships on those property owners prevented from developing the economic potential of their land, and this constitutes a taking as clearly as does a temporary physical taking.

Requiring compensation for temporary, but economically significant, restraints on use and enjoyment of private property will ensure that the burdens of achieving a socially desirable goal will be equitably allocated among all taxpayers, and it will ensure that

the electorate makes informed decisions about policy choices and priorities.

ARGUMENT

I.

REGULATORY LIMITS ON ECONOMIC USE OF PROPERTY ARE AS MUCH "TAKINGS" AS ARE PHYSICAL APPROPRIATIONS

A. Regulatory Limitations on Use of Property Are Takings.

The use and enjoyment of private property is a fundamental right, and important to a democratic society. The takings clause was designed to protect this core value.

Federal, state and local government agencies have developed new forms of regulation that make it difficult to discern clear boundaries between private property and what belongs to the community. Government entities constantly develop new and artful ways to appropriate rights to use and enjoy private property for the "public good."

The traditional common law distinctions between private property and state power have blurred as federal agencies, states, counties, cities and other local government units perform more functions -- many of them "proprietary" in nature -- to use property ownership to achieve governmental objectives, and to establish new forms of regulation through licenses, franchises, development subsidies, etc. Actions by government officials often cannot be separated from private sector interests. Indeed, every public act is, at least in part, a response to expressed desires of private

individuals, and private actions often are a response to governmental institutions, rules or incentives.

Unless constrained by a requirement to compensate owners of private property, in a majoritarian system, government agencies will unfairly allocate disproportionate burdens of achieving public purposes to politically weak segments of the citizenry.

Justice Brennan recognized the ubiquitous nature of takings. He did this both in equating regulatory takings and physical invasion, and in equating "temporary" and "permanent" takings for purposes of compensation. His approach brings consistency to the interpretation of the takings clause. Government actors occasion losses in both regulatory and physical invasion cases, and the losses have the same effect on the property owner whether they are permanent or temporary, except, of course, for the quantum of damage caused.

> Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property. From the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it. . . .It is only logical, then, that government action other than acquisition of title, occupancy, or physical invasion can be a "taking," and therefore a de facto exercise of the power of eminent domain, when the effects completely deprive the owner of all or most of his interest in the property.

San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 652-53 (1981)(hereafter "*San Diego Gas & Elec. Co.*") (Brennan, J., dissenting).

Professor Richard A. Epstein argues, and *amici* urge on this Court, that nearly all regulatory restrictions on the use and disposition of private property should be seen as prima facie takings. R. Epstein, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 57 (1985).

Ownership consists of three separate incidents: possession, use, and disposition. As the Court in *United States v. General Motors Corp.* expressed it:

> The critical terms [of the takings clause] are "property," "taken" and "just compensation." [These terms] have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter.

323 U.S. 373, 377-378 (1945).

"...[P]ossession, use and disposition do not form a random list of incidents; they form the core of a comprehensive and coherent idea of ownership." R. Epstein, *supra* at 60. If government removes or diminishes the rights of the owner in any of the incidents of ownership, "it has prima facie brought itself within the scope of the eminent domain clause, no matter how small the alteration and no matter how general its application." R. Epstein, *id.* at 57. In Professor Laurence Tribe's plain English statement, ". . . forcing someone to stop doing things with his property — telling him 'you can keep it, but you can't use it — is at times indistinguishable, in ordinary terms, from grabbing it and

handing it over to someone else." (L. Tribe, AMERICAN CONSTITUTIONAL LAW § 9-3 at 593 (2d ed. 1988)).

Property owners have a right to build on their property, subject only to reasonable regulation. "[T]he right to build on one's own property--even though its exercise can be subjected to legitimate permitting requirements--cannot remotely be described as a "governmental benefit." *Nollan v. California Coastal Commission*, 483 U.S. 825, 845 n.2 (1987) (hereafter "*Nollan*").

One commentator summarized the difference between a "right" and a "benefit"in this context:

> If a benefit is merely a privilege, then it will continue only so long as government officials determine that continuance "serves the public interest." The recipient of a privilege faces substantial uncertainty and insecurity, and is at the mercy of government planners and administrators who base their authority on claims to expert objectivity. Moreover, the beneficiary knows that expert decisions are often more arbitrary than these claims would suggest.
>
> "[R]ight[s]" . . . are more certain and secure. Courts offer protection to holders of rights against arbitrary or otherwise unjust government actions . . . .As a practical matter, the government may be able to revoke established rights only if the political process devises some form of compensation; revocation without compensation may be considered a de facto "taking" of a private property right.

Nelson, "Private Rights to Government Actions: How Modern Property Rights Evolve," 1986 U. ILL. L. REV. 361, 364.

B. Regulatory Takings Require Compensation.

In economic terms, requiring compensation is a way to force public policymakers to consider the opportunity costs of their proposed actions. Policies that "take" private property would then have concrete budgetary impacts that would be immediately reflected in tax bills or municipal borrowing capacity. If the regulatory action does not have a cost to the government (and thus to the public at large) regulators will believe that if they use a regulatory scheme to stop development, they need not pay for the impact on the owners, and will thus not be accountable to the citizenry at large.

Economically efficient takings rules will also affect the behavior of private citizens. Public choices are the result of the competition of various groups for political benefits. Powerful groups may not need a constitutionally mandated takings doctrine to protect their interests; they will be able to ensure that the overall legislative package is beneficial to them. Politically ineffective individuals or groups, however, may be severely injured by some public policy. Efficiency and fairness require that their costs be taken into account. The operation of the political process may not incorporate these costs, and thus compensation should be paid for these losses to force politicians to recognize the existence and rights of such small, powerless groups. *Amici* submit that the location of the takings clause in the Bill of Rights evidences a clear intent that the requirement of just compensation is designed to protect those with insufficient political power to protect their interests.

When public policies have unpredictable or disproportionate impacts on small groups, the legitimacy of government depends on the payment of compensation to mitigate

the arbitrary distributive consequences of many public policies. Citizens whose assets have been taken are unlikely to be satisfied with the argument that the system, "over all," is fair.

Private property and its protection are important building blocks of democracy. Private property helps distinguish individuals' interests from those of the state, and thus acts as a limit on state power.[4]

In a typical regulatory takings case, a government agency adopts a measure that severely restricts the ability of the landowner to productively use her land, whether by rezoning, denials of permits or variances, density limitations, etc. *See, e.g., San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). When the effect of such regulations is to deny private landowners economically productive use of their land, compensation must be paid. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). When a government agency imposes a moratorium on development, the *sole* purpose of that action is to foreclose the landowner's ability to make *any* economic use of his land, either for a finite or an indefinite period.[5] Without an economic cost to government -- and

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[4] For the central importance of private property to the creation and preservation of democracy in the inevitable tension between the individual and government, *see* John Locke, OF CIVIL GOVERNMENT ¶¶ 135, 138 (1690); Max Weber, "Politics as a Vocation" in H. H. Gerth and C. Wright Mills, eds., FROM MAX WEBER, ESSAYS IN SOCIOLOGY 78 (Galaxy ed. 1958).

[5] The moratorium may be to permit local planners to study the potential uses of land in the area without having development take place during their study, or it could be to delay development until public facilities are adequate to serve it, or it could be to preclude development indefinitely. Sometimes moratoria are abused by local agencies, mouthing the words of planning propriety while intending all along to prevent use forever — or at least as long as possible. *See, e.g.*, Wendy U. Larsen & Marcella Larsen, "Moratoria as Takings Under

the public -- such actions will not stop. Taxpayers should be able to decide whether they need or want to impose severe restrictions so much that they are willing to pay a price to do so, rather than imposing the cost on private landowners. As this Court perceived in *Lucas*:

> regulations that leave the owner of land without economically beneficial or productive options for its use--typically, as here, by requiring land to be left substantially in its natural state--carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.

505 U.S. at 1018. To similar effect, this Court held in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) that private property cannot cavalierly be commandeered without payment simply "because the public wanted it very much." As that Court perceptively stated it, "[T]he question at bottom is upon whom the loss of the changes desired should fall." *Id.*, at 416.

The Court can anticipate that TRPA and its *amici curiae*

Lucas," 46 Land Use Law & Zoning Dig., no. 6, p. 3 (1994). As Judge Kozinski noted in his dissent from the denial of rehearing en banc:

> Why would a government enact a permanent regulation- and risk incurring an obligation to compensate when it can enact one moratorium after another, perhaps indefinitely? Under the theory adopted by the panel, it's hard to see when a property owner would ever state a takings claim against such a scheme.

Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 228 F.3d 998, 1001 (9th Cir. 2000).

For a description of the subtlety of land use planners in devising methods to prevent development without incurring the obligation to pay compensation, *see* Robert S. Freilich & Elizabeth A. Gavrin, "Takings After *Lucas*" in David L. Callies, ed., AFTER *LUCAS*: LAND USE REGULATION AND THE TAKING OF PROPERTY WITHOUT COMPENSATION (American Bar Ass'n Section of Urban, State and Local Government Law (1993)).

will claim that moratoria are necessary for an effective planning process.[6]

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[6] In an *amicus curiae* brief filed in *First English* on behalf of nearly half the states (Alaska, Arkansas, California, Florida, Hawaii, Illinois, Maine, Massachusetts, Minnesota, Mississippi, Missouri, New Hampshire, New York, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington, Wyoming, and Puerto Rico) argued that "Adoption of appellant's radical reformulation of takings jurisprudence would cripple amici's ability to perform regulatory functions upon which their citizens' health, safety and welfare quite literally depend." States' *amicus* brief in *First English* at 1-2. The states argued further that "Compelled payment of interim damages. . . would . . . carry the risk of financial chaos for state and local governments; and . . . have a major chilling effect on the regulatory process." *Id.* at 2, and that "[T]he rule urged by appellant could undermine the fiscal well-being of state and local governments. Judicially compelled damages in this context could have major adverse fiscal consequences. *Id.* at 23. The award of damages against government entities predicated on a "temporary taking" theory, they urged, would have "a major chilling effect upon essential governmental functions." *Id.* at 25.

Similar arguments were advanced by the State and Local Legal Center in its *amicus* brief on behalf of the National Association of Counties, the National League of Cities, the U.S. Conference of Mayors, the National Governors' Association, the American Planning Association and others in *First English*: "such a decision could paralyze governmental efforts to regulate land use to protect the public health and safety from a host of...injuries....In the wake of such a decision, claims for compensation [would] overload[ ] court dockets and threaten[ ] bankruptcy for state and local governments. Brief of State and Local Legal Center at 3.

The same types of arguments were made to this Court in *Nollan* by the County Supervisors Association of California, six counties and 46 cities in California: "the Court's decision in this case may affect *amici curiae's* continued ability to regulate land use for the benefit of the public. . . . A finding by this Court that dedication requirements are either permanent physical occupations or lesser physical invasions subject to stricter scrutiny than other regulatory actions is legally insupportable and would have drastic implications." California entities brief at 2.

These arguments simply ignore the point that "Once a court determines that a taking has occurred, the government retains the whole range of options already available--amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain." *First English*, 482 U.S. at 321.

Rather than being a limitation on the ability of government to act in the public interest, compensation is a substitute for imposing severe restrictions on the ability of public officials to adopt policies that are deemed desirable by the political class or a majority of the political unit. The Fifth Amendment is designed to

> prevent the public from placing upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.

Monongahela Navigation Company v. United States, 248 U.S. 312, 325 (1893). As Chief Justice Rehnquist put it in *First English*:

> It is axiomatic that the Fifth Amendment's just compensation provision is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

First English, 482 U.S. at 318-319 (citations omitted). He recognized the need to balance the needs of governments to protect the public interest and the Constitution's overarching purpose in protecting the rights of individuals *as against* government power:

> We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental

> authorities, and the Just Compensation Clause of the Fifth Amendment is one of them. As Justice Holmes aptly noted more than 50 years ago, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Pennsylvania Coal Co. v. Mahon, 260 U.S., at 416, 43 S.Ct., at 160.

First English, 482 U.S. at 321-322.

Justice Scalia, in finding that a taking had occurred in *Nollan*, argued that even if the California Coastal Commission's policy was sound, it does not follow that coastal residents "can be compelled to contribute to its realization . . . . [I]f [the Commission] wants an easement across the Nollans' property, it must pay for it." *Nollan*, 483 U.S. at 841.

II.

TEMPORARY TAKINGS REQUIRE COMPENSATION

The fact that a moratorium may be characterized as "temporary" should have no bearing on the property owner's entitlement to compensation, if the limitation on her use of her property is significant and endures for more than a de minimis time.[7]

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[7] Chief Justice Rehnquist set out practical parameters in *First English*: "We. . .do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us." 482 U.S. at 321.

Justice Brennan analyzed the legal principles succinctly when he wrote:

> "The fact that a regulatory 'taking' may be temporary, by virtue of the government's power to rescind or amend the regulation, does not make it any less of a constitutional 'taking.' Nothing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable. Nor does the temporary reversible quality of a regulatory 'taking' render compensation for the time of the 'taking' any less obligatory. This Court more than once has recognized that temporary reversible 'takings' should be analyzed according to the same constitutional framework applied to permanent irreversible 'takings.' "

San Diego Gas & Elec. Co., 450 U.S. at 657 (1981) (Brennan, J., dissenting). In his opinion in *San Diego Gas*, Justice Brennan expounded a unified theory of takings. In Justice Brennan's view, derived from the conviction, which *amici* share and urge here, that the Bill of Rights is an individual's fundamental protection against governmental overreaching, all the many divergent types of limitations on private property owners require compensation. The fact that some limitations may be for temporary periods of time merely affects the amount of compensation that would be due. (*see* 450 U.S. at 658-660.)[8]

In *First English*, Chief Justice Rehnquist began his analysis of this issue by pointing out the equivalence under the takings clause of the Fifth Amendment of physical invasions and

[8] *See Hendler v. United States*, 952 U.S. 1364, 1376 (Fed. Cir. 1991) ("[T]he fact that [the government's] action was finite went to the determination of compensation rather than to the question of whether a taking had occurred").

regulations which have the effect of destroying an owner's property interest. Chief Justice Rehnquist went on to analyze cases of temporary physical invasion takings, from which he concluded that "[t]hese cases reflect the fact that 'temporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation" (*First English*, 482 U.S. at 318). Temporary physical invasions constitute takings and regulatory takings are equivalent to physical invasion takings. *First English*, 482 U.S. at 319; *see also San Diego Gas and Electric Co.*, 450 U.S. at 653 (Brennan, J., dissenting). When the government's actions have already effected a taking of all economic use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective. *First English*, 482 U.S. at 321.

First English thus recognizes a class of temporary regulatory takings, adopting Justice Brennan's reasoning in his dissent in *San Diego Gas and Electric Co.* In recognizing that compensation is due for temporary takings, the Court refined its economic impact criterion to encompass fairly short-term losses, and also recognized that takings of various kinds -- physical invasion or regulatory restrictions, permanent or temporary -- constitute a continuum of government actions, all of which require compensation.

Temporary takings, as this Court held in *First English*, are no different in kind from permanent takings. The duration of the taking merely affects the *quantum* of compensation, not entitlement to compensation.[9]

[9] Requiring compensation for "temporary planning moratoria" will not paralyze land use planners and will not let loose rapacious developers. If a planning moratorium is longer than "normal delays in obtaining building

As Justice Brennan noted, from the property owner's perspective, there is no substantive difference between a government agency's decision to halt all use of property, even "temporarily," and a government agency's decision to physically take the property temporarily. Either way, the government prevents the owner's use of the property for whatever period it deems necessary or desirable. *See San Diego Gas & Elec. Co.*, 450 U.S. at 652 (dissenting opinion). "What stamps a government action as a taking is what it does to the property rights of each individual who is subject to its actions: nothing more or less is relevant." R. Epstein, *supra*, at 94.

When regulations deny an owner the use of his land through the exercise of the police power, whether it is a physical invasion or a regulatory limitation, there is no effective difference.[10] In both situations, the owner is deprived of the use and enjoyment of the land, and it is that deprivation, not the acquisition of title by the government, that constitutes a taking.

> [T]he deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held,

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permits, changes in zoning ordinances, variances, and the like . . . ." (*First English*, 482 U.S. at 321), but amounts to a reasonable development hiatus, the time value may be too little for an owner to have an incentive to undertake the lengthy and expensive legal proceedings to collect damages. If she does, the cost to the government agency will not be so prohibitive that the agency will be deterred from enacting the moratorium, if it deems such truly to be in the public interest.

[10] In *First English*, 482 U.S. at 319, this Court analogized regulatory taking for a period of years to the condemnation of a leasehold, which requires compensation: "The value of a leasehold interest in property for a period of years may be substantial, and the burden on the property owner in extinguishing such an interest for a period of years may be great indeed."

> if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking."

United States v. General Motors Corp., 323 U.S. 373, 378 (1945).

Justice Stevens, dissenting in *First English*, argued that what the Court called a "temporary regulatory taking" was in fact merely a small diminution of value:

> Why should there be a distinction between a permanent restriction that only reduces the economic value of property by a fraction-perhaps one-third-and a restriction that merely postpones development of a property for a fraction of its useful life-presumably far less than a third?

First English, 482 U.S. at 332. These are, according to Justice Stevens, "irreconcilable results." (*id.*)

Amici submit that Justice Stevens, dissenting in *First English*, was correct in pointing out the apparent anomaly, but *amici* also suggest that the results are not "irreconcilable." Justice Stevens' proposed solution -- in essence to ignore the "temporary" loss suffered by the property owners -- defeats the central purpose of the takings clause, to protect individual rights. The doctrinally consistent and constitutionally acceptable way to reconcile the results is for this Court to reiterate that both permanent regulatory restrictions that result in partial, but significant, reductions in economic value of property and regulations (or moratoria) that postpone development for a substantial time, require compensation.

This approach achieves a basic objective of the law: clarity, coherence, predictability and substantial consistency in application. It recognizes a "temporary" moratorium as a taking for the duration of the moratorium. When government action interferes substantially with, or limits, the ability of a property owner to use

his land in an economically viable way a taking has occurred and compensation is due:

> The language of the Fifth Amendment prohibits the "tak[ing]" of private property for 'public use' without payment of 'just compensation.' As soon as private property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, the landowner has *already* suffered a constitutional violation, and the self-executing character of the constitutional provision with respect to compensation is triggered. This Court has consistently recognized that the just compensation requirement in the Fifth Amendment is not precatory: once there is a 'taking,' compensation *must* be awarded."

San Diego Gas & Elec. Co., 450 U.S. 621 at 654 (Brennan, J., dissenting; citations and internal quotation marks omitted; emphasis in original.)

Temporary development moratoria, if not clearly and closely limited in duration, work significant hardships on the property owners prevented from developing the economic potential of their land, and this constitutes a taking as clearly as does a temporary physical taking. Requiring compensation for temporary, but economically significant, restraints on use and enjoyment of private property will ensure that the burdens of achieving a socially desirable goal will be equitably allocated among all taxpayers, and it will ensure that the electorate makes informed decisions about policy choices and priorities.

This Court need not, in this case, determine whether there is a "bright line" between the "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like"

described in *First English*, 482 U.S. at 321, and a temporary regulatory interference with ownership rights that amounts to a taking.[11] The fact that in this case the regulatory agency has adopted a consecutive series of "temporary" moratoria that has prevented Petitioners from building single family residences on their land for two decades clearly falls on the "takings" side of any such line.

The Ninth Circuit dismissed the relevance of *First English* case by describing it as "not even a case about what constitutes a taking." (*Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 216 F.3d 764, 777 (9th Cir. 2000). The Circuit Court simply ignored plain language in *First English*, where this Court stated the issue thus: "We now turn to the question whether the Just Compensation Clause requires the government to pay for 'temporary' regulatory takings." (482 U.S. at 313). Indeed, the phrase "temporary regulatory taking" or its equivalent appears throughout the majority and dissenting opinions in *First English*. This Court apparently thought that case was about whether a "temporary" regulatory limitation on ownership rights is a "taking."

This Court had no problem dealing directly with the question whether compensation is required when the landowner's bundle of property rights is "temporarily" abrogated, nor in holding that such a deprivation was compensable. The facts of this case warrant no different outcome.

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[11] As Judge Kozinski put it "[T]here is no clear-cut distinction between a permanent prohibition and a temporary one. Governmental policy is inherently temporary while land is timeless. Even a permanent prohibition can be rescinded and, in the fullness of time, almost certainly will be." *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 228 F.3d 998, 1001 (9th Cir. 2000).

CONCLUSION

Amici respectfully submit that this Court has already held that both regulatory takings and physical takings require the government to compensate the owner of the private property taken. *Amici* also respectfully submit that this Court has recognized that "temporary" limitations on the exercise of property ownership rights can be a taking if they exceed quite modest duration. These doctrines are, in fact, necessary to effectuate a core constitutional protection.

The judgment of the Court of Appeals for the Ninth Circuit should be reversed.

September 18, 2001

Respectfully submitted,
MARTIN S. KAUFMAN
Counsel of Record
Atlantic Legal Foundation
205 East 42nd Street
New York, New York 10017
212-573-1960

Counsel for Amici Curiae

ADDENDUM

DESCRIPTION OF THE *AMICI*

American Association of Small Property Owners is a nonpartisan, nonprofit 501(c)(3) corporation. Since 1993, AASPO has been working for the right of small property owners to prosper freely and fairly -- to make possible the American dream of building wealth through real estate. Based in Washington, DC, AASPO is the only national organization for small landlords, property owners and real estate investors to share information and strategies on important issues of the day. AASPO has chapters in more than 25 states.

American Land Rights Association is a national clearinghouse and support coalition, encouraging private property ownership, family recreation, multiple use of federal lands, commodity production, and access to federally controlled lands. ALRA has a membership of 10,000.

Apartment Association of South Central Wisconsin, located in Madison, has been in existence since 1969, and is the only organization serving the rental housing providers of Columbia, Dane, Green, Sauk, and Iowa Counties in Wisconsin. Its mission is "To unite and serve area apartment owners, managers, investors, and the community; and promote an environment in which members may successfully conduct their businesses while serving their residents and their communities with honesty, integrity, fairness and the highest degree of professionalism." It has approximately 500 members.

Apartment Owners Association of Southern California, Inc. is a trade association that provides educational and support services to apartment owners throughout the State of California. Located in Van Nuys, AOA was founded in 1978 and currently has 12,000 members.

Berkeley Property Owners Association of Berkeley, California, has been defending the rights of small property owners for over twenty years. It is a nonprofit association of rental housing providers and has approximately 650 members.

Chicago Creative Investors Association provides educational, motivational and networking support to real estate investors in the Chicagoland area. It was founded in 1983 and currently has approximately 500 active members.

Genessee Landlord Association is a nonprofit trade association and has served the needs of landlords in the Flint, Michigan area for more than 25 years. It has more than 500 members.

Georgia Real Estate Investors Association, Inc. is the largest real estate investors association in the United States. With 2200 members, Atlanta-based GaREIA brings together the novice, the part-time and the experienced investor with education, networking, publications and a monthly meeting of educators and business associates to share information. GaREIA started in the early 1980's. Its mission is to assist its members in succeeding in their real estate investment plans by providing continuing education, motivation, and opportunity in a positive and mutually supportive environment.

Greater Dayton Real Estate Investors Association is a nonprofit educational association of real estate investors and rental housing providers serving eight counties in Southwestern Ohio. It has more than 350 members.

Illinois Rental Property Owners Association is an organization of rental property owners, investors, and managers in Illinois. It unites numerous member organizations from around the state, comprising approximately 4,000 property owners. Illinois Rental Property Owners Association's mission, in part, is to provide a unified voice for Illinois rental property owners.

Ohio Real Estate Investors Association is a state-wide business league that provides education and resources to enable property owners to realize the full potential of their real estate investments. It has 18 member groups in the state representing some 5,000 active members.

Property Owner's Association of Greater Baltimore, Inc. was established in 1957, and is a voluntary trade association consisting of hundreds of owners and/or managers of rental property in the Greater Baltimore metropolitan area. Its members own or control tens of thousands of rental units in the Baltimore area and range from owners of a few single family rental units to owners of hundreds of single and multi-family dwellings. The Association provides services to its members and the community in general, including educational seminars and mediation in landlord-tenant disputes. It also provides guidance and support to the Governor of Maryland and the Maryland General Assembly.

Property Owning Women is a nonprofit association of small rental building owners in New York City. It has approximately 100 members. Property Owning Women's mission, in part, is to educate the public about the role that small property owners play in the maintenance of New York City's diversity, economic health, and quality of life.

Real Estate Investors Association of Cincinnati is the largest and most active real estate investor group in Ohio and one of the biggest in the country. It has over 500 members.

Real Estate Investors Association of Toledo serves the needs of real estate investors in Northwest Ohio. The nonprofit association encourages all levels of investors to expand their knowledge by networking, attending meetings and participating in educational programs. It is active in public affairs with many of its members serving on various community boards. The Toledo REIA has approximately 300 members.

Suncoast Real Estate Investors Association, Inc. has 400 members, who provide safe and affordable housing to Tampa, Florida. It is a nonprofit corporation that exists to inform and educate its members in all aspects of real estate investing.

Certificate of Service

Martin S. Kaufman, an attorney admitted to practice before the bar of this Court, hereby declares under penalty of perjury that two copies of the foregoing brief of *amici curiae* American Association of Small Property Owners, *et al.* in support of the petitioner and motion for leave to file the *amicus* brief out of time were served on the following counsel of record for the parties on the 19th day of September, 2001, by depositing same in a postal depository box under the care of the United States Postal Service, in a properly addressed, first class postage prepaid envelopes addressed to them at:

Michael M. Berger
Berger & Norton
1620 26th Street, Suite 200 South
Santa Monica CA 90404
Counsel of Record for Petitioners

Lawrence L. Hoffman
Hoffman Law Offices
3000 No. Lake Blvd.
P.O. Box 7740
Tahoe City, CA 96145
Attorney for Petitioners

E. Clement Shute, Jr.
Shute, Mihaly & Weinberger
396 Hayes St.
San Francisco, CA 94102
Counsel of Record for Respondents

John L. Marshall
Tahoe Regional Planning Agency
P.O. Box 1038
Zephyr Cove, NV 89448
Attorney for Respondent Tahoe Regional Planning Agency

Hon. Bill Lockyer
Attorney General of the State of California
Attn.: Richard M. Frank
1300 I Street
P.O. Box 944255
Sacramento CA 94244-2550
Attorney for Respondent State of California

Hon. Frankie Sue Del Papa
Attorney General of the State of Nevada
Attn.: William J. Frey
100 North Carson Street
Carson City, NV 89701
Attorney for Respondent State of Nevada

Dated: New York, New York
September 19, 2001

Martin S. Kaufman

(13)

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IN THE

Supreme Court of the United States

TAHOE SIERRA PRESERVATION COUNCIL, INC., *et al.*,
Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL LEAGUE OF CITIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL GOVERNORS ASSOCIATION, INTERNATIONAL CITY-COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

TIMOTHY J. DOWLING
DOUGLAS T. KENDALL
COMMUNITY RIGHTS COUNSEL
1726 M Street, N.W.
Suite 703
Washington, D.C. 20036
(202) 296-6889

RICHARD RUDA *
Chief Counsel
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850

* Counsel of Record for the *Amici Curiae*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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QUESTION PRESENTED

Whether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the Takings Clause of the United States Constitution.

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INTEREST OF THE *AMICI CURIAE*

Amici's members include state and local governments and officials throughout the United States. These officials "have long engaged in the commendable task of land use planning." *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994). They bring a vital perspective to regulatory takings issues, and they have submitted *amicus* briefs in many takings cases. *See, e.g., Palazzolo v. Rhode Island*, 121 S. Ct. 2448 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). *Amici* have a compelling interest in preserving their ability to adopt reasonable development moratoria and demonstrating that these moratoria do not constitute *per se* takings. Because of the importance of these issues to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of this case.[1]

SUMMARY OF ARGUMENT

1. Reasonable, temporary development moratoria are an essential and widely used tool of land-use planning. They temporarily preserve historic land-use patterns so that new development does not undermine planning efforts. They also allow state and local officials to address threats to public safety from floods, fires, and the like. Courts regularly uphold reasonable moratoria against takings challenges, and they use the multifactor inquiry under *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), the Due Process Clause, and state-law doctrines to strike down moratoria that

---

[1] Counsel for the parties did not author this brief in whole or in part. No person or entity other than the *amici*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of *amicus* briefs, and on September 6, 2001, they filed a blanket consent.

are imposed in bad faith, unrelated to a legitimate purpose, or otherwise unreasonable. No court has adopted the sweeping *per se* rule proposed by petitioners.

2. The Tahoe moratorium is not a *per se* taking under *Lucas*. To prevail under *Lucas*, a landowner must show that regulation deprives the land of "all economically beneficial or productive use." 505 U.S. at 1015. *Lucas* and other precedents make clear that where existing or future uses allow land to be sold for more than nominal value, no *Lucas* taking has occurred. Petitioners, however, deliberately declined to introduce value evidence. In contrast, respondents provided expert appraisal evidence showing that the land covered by the Tahoe moratorium retained "reasonable economic value," Tr. 1408, with lots selling for as much as $110,000 in private sales at that time. J.A. 134. Petitioners' failure of proof defeats their *Lucas* claim.

Petitioners argue that a *per se* taking occurs where regulation denies a landowner the immediate ability to use land. But there is no "right of immediate use" whose temporary deprivation automatically gives rise to takings liability. Precedent governing the award of compensation in takings cases also counsels strongly in favor of ruling that there was no *Lucas* taking. Moreover, the relationship between the *Lucas per se* rule and the *Penn Central* multifactor inquiry reinforces the conclusion that no *per se* taking occurred.

3. Petitioners improperly conflate the clear distinction between physical occupations and land-use regulation that runs throughout takings jurisprudence. Nothing in *First English* obliterates this long-recognized distinction, which the Court reaffirmed as recently as last Term in *Palazzolo*.

ARGUMENT

Petitioners advance a radical position. They argue that a temporary ban on all land use—"for whatever period of time"—is a *per se* taking under *Lucas*. Pet. Br. 47. No court has ever adopted such a sweeping *per se* rule.

The posture of this case leaves them no choice but to rely on this extreme theory. The trial court ruled (Pet. App. 88-92) that the Tahoe moratorium is not a taking under the multifactor inquiry set forth in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978), a ruling that petitioners did not appeal. Pet. App. at 18-19. Nor did they appeal the trial court's finding that the Tahoe moratorium was a good-faith (*id.* at 68-69) and "proportional" response (*id.* at 86) to threats posed by unplanned development. *See also id.* at 115 ("we do not see how TRPA could have reached agreement on a regional plan any sooner"). To prevail, petitioners must contend that *Lucas*'s *per se* rule applies to every temporary moratorium on land development, regardless of its duration or reasonableness.

Due to petitioners' radical argument, the stakes in this case extend far beyond Lake Tahoe, the precious natural resource at issue. Petitioners' *per se* rule would require compensation not only for temporary development moratoria, but also government-compelled temporary facility closures and many other regulatory actions that temporarily prohibit the use of land. Under petitioners' *per se* theory, these temporary restrictions would require compensation no matter how narrow in scope and duration, no matter how slight the economic impact on the landowner, and no matter how weighty the government justification.

In contrast, respondents take a moderate position. They acknowledge that moratoria may constitute a taking under *Penn Central*'s multifactor inquiry, but contend that moratoria do not constitute a *per se* taking in every case. As shown below, respondents' approach is the only one consistent with *Lucas* and other regulatory takings cases. This longstanding precedent preserves the ability of state and local officials to implement reasonable moratoria, but provides for compensation where a moratorium truly rises to the level of confiscatory government action.

Section I of this brief shows that petitioners' proposed *per se* rule would severely undermine land-use planning measures that protect public health, safety, and welfare. Section II demonstrates that petitioners cannot prevail under *Lucas* because they failed to show that the Tahoe moratorium left their land with little or no value. Section III shows that petitioners improperly ignore the long-recognized distinction between physical invasions and land-use restrictions that applies when determining whether a taking has occurred under the Fifth Amendment.[2]

I. MORATORIA ARE AN ESSENTIAL AND WELL-ACCEPTED PART OF LAND-USE PLANNING.

1. State and local officials "have long engaged in the commendable task of land use planning, made necessary by increasing urbanization." *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994). Since the landmark ruling in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), the Court has upheld planning efforts used to enhance property values and protect communities. *See id.* at 394.

Moratoria are essential to sound planning. Comprehensive plans are not detailed blueprints for all future development, but instead a set of flexible policies that must be revised to meet changing conditions. Moreover, good land-use planning takes time. Absent a temporary delay in issuing new permits, planning could be undermined by new development. Courts

[2] In addition to arguing that all temporary denials of use are *per se* takings, petitioners assert that the Tahoe moratorium is permanent. This assertion goes beyond both the question presented and the record, which contains no evidence regarding whether the 1987 Regional Plan deprived petitioners' land of beneficial use. The record is silent on this issue precisely because the trial court dismissed the claims against the 1987 Plan as time-barred, *see* Pet. App. 128-55, a ruling affirmed on appeal, *see id.* at 47-56, and not included within the question presented.

long have recognized that planning efforts often trigger a rush to the permit office by developers hoping to obtain vested rights before new controls are implemented. *See, e.g.*, *Downham v. City Council of Alexandria*, 58 F.2d 784, 788 (E.D. Va. 1932) (planning "frequently precipitate[s] a race of diligence"; absent a moratorium, planning would be "like locking the stable after the horse is stolen"). Without moratoria, new construction could undercut planning measures before they see the light of day. *See Schafer v. City of New Orleans*, 743 F.2d 1086, 1090 (5th Cir. 1984) ("a moratorium may be necessary to prevent a plan's defeat before it is formulated").

Development moratoria also promote public participation in planning. Where moratoria authority is lacking, municipalities sometimes adopt hastily prepared, permanent controls insensitive to the needs of certain landowners. "[W]ith the adoption of an interim provision [the landowner] is made aware that a new plan is in the offing and is thus able to participate in the debate over what that new plan should contain." *Collura v. Town of Arlington*, 329 N.E.2d 733, 737 (Mass. 1975). The Tahoe moratorium, for example, allowed respondents to attend the many public meetings preceding the adoption of the permanent controls set forth in the Regional Plans. *See, e.g.*, Exhibit D-320, at p. 7 (observing that respondents "actively participated in the entire TRPA regional planning process leading to the adoption of the amended Regional Plan" and submitted comments at each public hearing on the Plan).

2. Development moratoria are used in a wide variety of contexts. They assist municipalities in addressing overburdened public services such as schools, roads, and sewers. To cite but one example, the town of Flower Mound, Texas—one of the fastest growing areas in the country—recently used a moratorium to assist in development of a comprehensive plan where uncontrolled growth threatened to overwhelm the

town's water, wastewater, and transportation systems. *See* Office of the Attorney General, Opinion No. JC-0142, 1999 WL 1028693 (Tex. A.G. Nov. 10, 1999). Moratoria facilitate historic preservation, floodplain manage-ment, protection of ecologically sensitive land, redevelop-ment of blighted urban areas, and revision of subdivision regulations. *See* 3 Patrick J. Rohan, ZONING AND LAND USE CONTROLS § 22.01 (1998).

Development moratoria also are used to address imminent threats to public health and safety. In *Cappture Realty Corp. v. Board of Adjustment*, 313 A.2d 624 (N.J. Super. Ct. 1973), the court upheld a three-year moratorium in flood-prone areas so that local officials could complete flood-control projects. Likewise, in *Zilber v. Town of Moraga*, 692 F. Supp. 1195 (N.D. Cal. 1988), the court upheld an 18-month moratorium on unstable slopes pending the adoption of appropriate construction guidelines. In *First English*, on remand from this Court, the state court upheld the challenged moratorium largely because it was imposed in response to floods that had drowned ten people and caused millions of dollars in property damage. *See First English Evangelical Lutheran Church v. County of Los Angeles*, 258 Cal. Rptr. 893, 895, 898-901 (Ct. App. 1989), *cert. denied*, 493 U.S. 1056 (1990).

The 21st century is bringing unforeseen challenges requiring the use of moratoria. The City of Portland, Oregon recently used a moratorium to protect its investment in central-city streetcar infrastructure against unforeseen threats posed by "telco hotels." *See* Portland Ordinance 175298 (Jan. 31, 2001). Telco hotels are large buildings occupied by equipment for internet and telecommunication service providers. Because these facilities employ very few people, their proliferation threatened to undermine Portland's streetcar service by precluding higher-density uses in the streetcar corridor. *Id.* The moratorium allowed planners to achieve the higher density necessary to support streetcar

service and thereby help absorb the 500,000 new city residents expected over the next 20 years. *Id.*

Although some moratoria prohibit only certain kinds of development, municipalities sometimes find it necessary to prohibit all development to advance comprehensive planning efforts. Moreover, even a moratorium that is limited to particular uses is subject to claims that the remaining uses are not economically viable. Courts routinely uphold these temporary bans where they are reasonable in view of all relevant circumstances. *See, e.g., Woodbury Place Partners v. City of Woodbury*, 492 N.W.2d 258 (Minn. Ct. App. 1992) (rejecting a takings challenge to a two-year moratorium on all development pending completion of a traffic-congestion study), *cert. denied*, 508 U.S. 960 (1993); *Williams v. City of Central*, 907 P.2d 701, 704-06 (Colo. Ct. App. 1995) (upholding a moratorium despite an allegation that it temporarily denied all use).

More than a dozen States have statutes that expressly authorize temporary development moratoria. 3 Rohan, *supra*, § 22.02[3][a], p. 22-17. Most other States have found that authority implicit in existing code provisions or home-rule authority. *See Collura*, 329 N.E.2d at 737 (upholding a two-year moratorium; "The weight of authority is that reasonable interim zoning provisions may be enacted within the scope of a general zoning enabling act . . . .").

Because moratoria are a traditional and necessary component of land-use planning, landowners cannot claim a "reasonable expectation[]," *Penn Central*, 438 U.S. at 125, to build at any specific time. Rather, it is reasonable to expect that state and local officials occasionally will adopt temporary moratoria where necessary to protect the public interest. *Cf. Lucas*, 505 U.S. at 1027 ("the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers"). This is especially

true in an ecologically fragile region that, in petitioners' words, contains "a unique treasure." Pet. Br. 3.

3. Because moratoria vary greatly in form and purpose, they are especially well-suited to takings analysis under *Penn Central*'s multifactor inquiry. In fact, courts long have used the *Penn Central* test, as well as the Due Process Clause and various state-law requirements, to ensure that moratoria are reasonable, related to legitimate goals, and imposed in good faith.[3] No court has embraced the sweeping *per se* rule proposed by petitioners.

Petitioners' proposed *per se* rule would severely limit, if not totally eliminate, the use of temporary bans on development and precipitate the very "race of diligence" (*Downham*, 58 F.2d at 788) between developers and planning authorities that courts have avoided through the application of existing precedent. The proposed *per se* rule would have particularly harsh impacts on small cities and towns that can ill-afford to defend takings claims brought by developers under unduly expansive theories of liability.[4] As Justice Kennedy has explained, inappropriately broad theories of takings liability unfairly subject "States and municipalities to the potential of new and unforeseen claims in vast amounts." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 542 (1998) (Kennedy, J., concurring in the judgment and dissenting in part). Municipalities would be forced to choose between

[3] *Compare State ex rel. SCA Chemical Waste Services, Inc. v. Konigsberg*, 636 S.W.2d 430, 435 (Tenn. 1982) (upholding moratorium), *and Almquist v. Town of Marshan*, 245 N.W.2d 819, 825 (Minn. 1976) (same) *with Lake Illyria Corp. v. Town of Gardiner*, 352 N.Y.S.2d 54 (App. Div. 1974) (invalidating moratorium under state law due to its unreasonable length and other facts that showed lack of good faith).

[4] *See* S. Rep. No. 105-242, at 45 (1998) (minority views) (although the top four U.S. residential developers have annual revenues that exceed $1 billion, 90% of American cities and towns have less than 10,000 people and cannot afford even one full-time lawyer).

paying untold amounts in compensation under the proposed *per se* rule or abandoning legitimate planning efforts needed to protect neighboring landowners and the general public.

Petitioners' proposed *per se* rule also would lead to bizarre results wholly at odds with the standard of fairness that informs takings analysis. For example, it could generate claims where a moratorium causes no economic harm. A landowner could seek fair rental value for the duration of the ban even if the owner was unaware of the ban until after its expiration. The proposed *per se* rule also might lead to invalidation of needed moratoria notwithstanding the absence of economic harm.[5]

A *per se* rule also could require compensation where a moratorium does not interfere with a landowner's expectations. Petitioners seek compensation even though the trial court concluded that the 32-month Tahoe moratorium did not thwart reasonable expectations because Tahoe Basin landowners voluntarily held land and refrained from development for an average of 25 years after purchase. Pet. App. 88-89. Nor is there any principled basis for distinguishing moratoria from the normal delays that attend the development application process. The Constitution should not be read to require windfall compensation to landowners whose interests are unaffected by reasonable moratoria or other expected delays. *See Lucas*, 505 U.S. at 1033-34 (Kennedy, J., concurring in the judgment) (courts must consider whether takings claimants "had the intent and capacity to develop" during a development ban because "the test must be whether the deprivation is contrary to reasonable, investment-backed expectations").

[5] *Cf. Washington Legal Found. v. Texas Equal Access to Justice Found.*, 2001 WL 1222105 (5th Cir. Oct. 15, 2001) (granting injunctive relief in a regulatory takings case despite the lack of economic harm to the claimants).

II. THE TAHOE MORATORIUM DID NOT EFFECT A *PER SE* TAKING UNDER *LUCAS*.

Petitioners come to this Court burdened with a striking evidentiary failure. They ask the Court to conclude that the Tahoe moratorium worked a *per se* taking under *Lucas* even though they deliberately declined to introduce evidence showing that the moratorium diminished the value of their land, much less rendered it valueless or nearly so. *See* Pet. App. 90. This section of the brief demonstrates that petitioners' evidentiary failure defeats their *Lucas* claim.

A. *Lucas* Does Not Create A "Right To Immediate Use."

The *Lucas* Court held that a *per se* taking may occur where regulation deprives a landowner of "all economically beneficial or productive use of land." 505 U.S. at 1015. The Court made clear, however, that no *Lucas* taking occurs where existing or future uses allow the land to be sold to a private party for value. *Id.* at 1027-28. Indeed, the Court noted that in some situations, "the property's only economically productive use is sale." *Id.* at 1028. The Court stressed that a landowner with a 95% value loss may not "claim the benefit of our categorical formulation." *Id.* at 1019 n.8. In other words, the ability to sell land for significant value is a beneficial use that defeats a *Lucas* claim, even where the value is relatively small as compared to the value of the land if left unregulated. In his opinion concurring in the judgment, Justice Kennedy agreed that *per se* treatment is appropriate only where land is left with "no significant market value or resale potential." *Id.* at 1033-34.[6]

[6] The record and posture of *Lucas* starkly presented the Court with the issue of whether a complete obliteration of value works a taking. In the first paragraph, the Court recited the trial court's finding that the development ban at issue rendered Lucas's land "valueless." 505 U.S. at 1007. The Court then articulated the question presented as whether the development ban effected a taking due to its "dramatic effect on the economic value of Lucas's lots." *Id.* In delineating the *per se* rule, the Court again emphasized the key factual predicate that underlies the *per se* rule: the trial court's finding that the lots had been "rendered valueless." *Id.* at 1020. The pivotal nature of this finding is evidenced both by the skepticism regarding its accuracy expressed by each of the four separate opinions, as well as the Majority's specific response to those concerns. *Compare id.* at 1020 n.9 (Majority) *with id.* at 1034 (Kennedy, J., concurring in the judgment); *id.* at 1043-44 (Blackmun, J., dissenting); *id.* at 1065 n.3 (Stevens, J., dissenting); *and id.* at 1076 (Souter, J., statement). The *Lucas* Court also distinguished earlier cases that found no taking because "[n]one of them . . . involved an allegation that the regulation wholly eliminated the value of the claimant's land." *Id.* at 1026 & n.13. One of the cases so distinguished—*Hadacheck v. Sebastian*, 239 U.S. 394 (1915)—involved a value loss of 92.5% (from $800,000 to $60,000), further showing that *Lucas*'s *per se* rule applies exclusively where land is left valueless or with only nominal value.

In last Term's *Palazzolo* ruling, the Court reaffirmed that the *Lucas per se* rule is inapplicable where land retains more than nominal value. *Palazzolo*, 121 S. Ct. at 2465 (rejecting Palazzolo's *Lucas* claim because "petitioner failed to establish a deprivation of all economic value"); *see also id.* at 2476 (Ginsburg, J., joined by Souter & Breyer, JJ., dissenting) ("a floor value was all the State needed to defeat Palazzolo's simple *Lucas* claim"). To be sure, *Palazzolo* clarified that the government may not defeat a *Lucas* claim by showing that the landowner retains only "a few crumbs of value," *id.* at 2464 (quoting Brief for Petitioner), or what the Court called "token" value, *id.*, but the ruling reaffirmed that a *Lucas* claim lies only where regulation leaves land with nominal or no value.[7]

[7] Palazzolo alleged that he retained only 6% of his land's $3,150,000 unregulated value, but this assertion was not enough to support a *Lucas* claim. *See* 121 S. Ct. at 2456, 2464-65. This result is not surprising in view of the *Lucas* Court's observation that a 95% value loss does not trigger the *Lucas per se* rule. *See* 505 U.S. at 1019 n.8.

Other cases confirm this bedrock principle. In *Agins v. City of Tiburon*, 447 U.S. 255 (1980), the Court stressed that the beneficial-use inquiry requires examination of the "diminution in market value" caused by the challenged regulation. *Id.* at 262, 263 n.9. In *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), the Court could not determine whether the claimants were denied beneficial use of their property because "[t]here is no record as to what value" the property had. *Id.* at 502 n.29. Federal appeals courts and state supreme courts properly adhere to this Court's rulings that land has no economically beneficial use only where it is left with nominal or no value.[8]

Petitioners understandably sidestep this adverse precedent and attempt to shift the focus from value to immediate use. Their suggested dichotomy between use and value is a false choice because, as shown above, there is no *Lucas per se* taking where existing and future uses allow the owner to recoup value through sale to a private party. Nevertheless, petitioners argue that *Lucas* establishes an absolute right to

[8] *See, e.g., Rith Energy, Inc. v. United States*, 2001 WL 1380899 at 1 (Fed. Cir. Nov. 5, 2001) (On Petition for Rehearing) ("The [*Palazzolo*] Court held that because Mr. Palazzolo retained some economic value in the regulated property, the denial of a building permit in Mr. Palazzolo's case did not constitute a categorical taking."); *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 286 & n.5 (4th Cir. 1998) (no *Lucas* taking where land retains value); *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 903 (Fed. Cir. 1986) (five judge panel) (sale of land for value "would be a sufficient remaining use of the property to forestall a determination that a taking had occurred"), *cert. denied*, 479 U.S. 1053 (1987); *Pompa Constr. Corp. v. City of Saratoga Springs*, 706 F.2d 418, 424 (2d Cir. 1983) ("the key question" in a takings case is whether others "might be interested in purchasing all or part of the land"); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 935 (Tex. 1998) ("Determining whether all economically viable use of a property has been denied entails a relatively simple analysis of whether value remains in the property after the governmental action."), *cert. denied*, 526 U.S. 1144 (1999).

use land immediately, and that a *per se* taking occurs whenever regulation temporarily prohibits land use, regardless of the regulation's effect on value.

No court has ever recognized such an absolute constitutional "right to build *immediately*" whose temporary deprivation works a *per se* taking. *Lucas* describes its *per se* rule as applying where regulation denies all beneficial use of land, 505 U.S. at 1015, not where it denies only the immediate ability to use the property. Petitioners' proposed *per se* rule would lead to *per se* treatment run amok in contravention of this Court's recognition that *per se* rules have a very limited role in takings jurisprudence. *See Lucas*, 505 U.S. at 1017-18 (*Lucas*'s *per se* rule applies only in "extraordinary" and "relatively rare" circumstances); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (whether a regulation effects a taking "is a question of degree—and therefore cannot be disposed of by general propositions"); *see also Palazzolo*, 121 S. Ct. 2467 (O'Connor, J., concurring) ("The temptation to adopt what amount to *per se* rules in either direction must be resisted.").

B. Petitioners' Land Retained Both Use And Reasonable Economic Value, Thereby Foreclosing A *Per Se* Taking Under *Lucas*.

1. This case involves only a facial challenge. *See* Pet. App. 19 ("Our focus is . . . narrowed by the fact that the plaintiffs bring only a facial challenge to Ordinance 81-5."). Petitioners therefore "face an uphill battle . . . since it is difficult to demonstrate that mere enactment of a piece of legislation deprived [the owner] of economically viable use of his property." *Suitum*, 520 U.S. at 736 n.10 (quoting *Keystone*, 480 U.S. at 495 and *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 (1981) (internal quotation marks omitted)).

Despite their heavy burden, petitioners pursued a risky legal strategy. Believing that they could prevail under *Lucas* simply by showing that they were deprived of the right to develop immediately, petitioners declined to offer evidence as to the moratorium's impact on property value. Unlike Mr. Lucas, who proved that his property had been rendered "valueless," *Lucas*, 505 U.S. at 1007, 1020, petitioners moved to exclude all value evidence. Pet. App. 92. After the trial court denied that motion, petitioners failed to meet their burden of showing that the moratorium left their land with little or no value. They offered no evidence at all regarding the effect of the Tahoe moratorium on the value of their land.[9]

In the words of the trial court, petitioners made a "calculated choice" to introduce "no evidence regarding the specific diminution in value of any of the [petitioners'] individual properties." Pet. App. 90. In ruling on the *Penn Central* claim, the trial court concluded that "[s]ince the burden is on the plaintiffs to show that a taking occurred (and since that burden is especially heavy in a facial challenge such as this), the fact that they agreed not to introduce this type of evidence works against them." *Id.*

With respect to petitioners' *Lucas* claim, this calculated choice not only "works against them," it was a fatal error. Their strategy leaves them in the untenable position of

[9] Petitioners' appraiser conceded that he was "not rendering an estimate of value." Tr. 1555. While he testified that, in his opinion, petitioners' land was not economically viable during the moratorium, he premised this conclusion on a definition of economic viability that required a "return to the buyer in terms of the cost of acquisition of the property, any holding costs, and any anticipated profits." Tr. 1562. Mr. Palazzolo similarly argued for a rate-of-return definition of economic viability (*Palazzolo*, Pet. Br. on the Merits, at 36-44), a definition that this Court rejected. *See Palazzolo*, 121 S. Ct. at 2464-65; *see also United States v. Powelson*, 319 U.S. 266, 285 (1943) (the Fifth Amendment does not guarantee a return on investment).

arguing, without a scintilla of supporting evidence in the record, that a moratorium that preserves historic land-use patterns for less than three years left their property with little or no value. Their effort fails *ab initio* and respondents would have been entitled to a directed verdict on the *Lucas per se* claim at the close of petitioners' case, had they so moved.[10]

2. Petitioners' trial strategy is readily explained by the appraisal evidence they sought to exclude. Petitioners simply had no good alternative. Respondents showed at trial that land covered by the moratorium retained both use and "reasonable economic value." Tr. 1408.

Respondents' evidence of remaining use and value was provided by Steven Johnson, an experienced appraiser who has appraised thousands of lots in the Tahoe Basin. *Id.* at 1380. Johnson first noted that the average holding time of a vacant lot in the Tahoe area between lot purchase and home construction is twenty-five years. *Id.* at 1394; 1435-41. Thus, the moratorium had no impact on most landowners in the Basin.

More importantly, Johnson testified that buyers were willing to pay substantial prices for restricted lots during the moratorium for several reasons. Some buyers purchased lots simply to own land in the Tahoe Basin. *Id.* at 1465. Others purchased with the hope that development ultimately would

[10] Remarkably, petitioners assert (Br. 48) that the trial court "found" and the Ninth Circuit "affirmed" that the moratorium precluded all economically productive use. There was no such finding or affirmation. The purported "finding" (Pet. App. 99) is in a section of the trial court opinion entitled "Conclusions of Law." *Id.* at 82. More importantly, the Ninth Circuit ruled that the trial court's assertion was based on an erroneous "legal conclusion" (*id.* at 40 n.30) that "misread[s precedent] in at least two ways." *Id.* at 37 n.25. In other words, the court of appeals expressly repudiated on legal grounds the very determination that petitioners claim was affirmed.

be permitted. *Id.* at 1395, 1464. Sophisticated developers bought lots that had the potential to be reclassified and permitted for development. *Id.* at 1395. Adjacent property owners purchased lots to protect their open space and view corridors (*id.* at 1395), to secure the privacy, seclusion, and control that ownership conveys (*id.* at 1470), and to increase the land coverage for development that would be permitted on the adjacent parcel. *Id.* at 1395-96, 1401-05.

Johnson identified many private sales of restricted parcels throughout the Tahoe Basin. The record shows that properties comparable to petitioners' sold to private parties for as much as $110,000 from 1981 to 1987. J.A. 134; Tr. 1409. Prices for class 1-3 lots in Nevada ranged from $6,000 to $95,000. J.A. 131; Tr. 1396-1400. Prices for class 1-3 lots in California ranged from $10,000 to $18,415. J.A. 132; Tr. 1400-03. Prices for Stream Environment Zone lots ranged from $5,000 to $110,000. J.A. 134, Tr. 1408-11. Based on this and other evidence, Johnson concluded that lands covered by the moratorium had "reasonable economic value" in the open market during the moratorium. Tr. 1408; *see also id.* at 1410-15.

Petitioners' failure to offer value evidence defeats their *Lucas* claim. Johnson's testimony showing that their lots retained "reasonable economic value," Tr. 1408, confirms that this result was inevitable.[11]

[11] All land in the Tahoe Basin retains value in large measure due to the protections for Lake Tahoe. A major component of the value of property in the Basin comes from its proximity to the Lake, a precious natural resource which is world-renowned for its clarity and serves as the engine of the Basin's economy. *See* Pet. App. 84 ("[T]he beauty of Lake Tahoe is largely responsible for driving the economy of the region, which is based almost entirely on tourism."). Without the protections challenged in this case, the Lake would turn green (*id.* at 4-6, 61-65) and land values in the region would plummet.

C. Longstanding Precedent Governing Just Compensation Supports Consideration Of Petitioners' Remaining Uses And Value In Evaluating Their *Lucas* Claim.

Petitioners assume that the available uses of their land during the moratorium—for example, future uses and use for sale to neighboring property owners—are irrelevant to Fifth Amendment analysis. But for more than a century, this Court has taken these same uses into account in assessing value and just compensation in direct condemnation cases. These rulings leave no doubt that the uses of petitioners' land available during the moratorium are "highest and best uses" that must be considered in determining value in takings cases.

For example, in *Olson v. United States*, 292 U.S. 246 (1934) (cited with approval in *Palazzolo*, 121 S. Ct. at 2461), this Court held that just compensation is determined by reference to the "highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future." 292 U.S. at 255. The uses valued for compensation purposes in *Olson* were future, potential uses for farming and as a fishing station. *Id.* at 254.

Fifty years earlier, in *Boom Co. v. Patterson*, 98 U.S. 403 (1878), the Court determined that takings analysis must consider the potential uses of a parcel in conjunction with adjacent parcels. *Patterson* addressed the compensation due the owner of three unused islands in the Mississippi River. The Court awarded compensation based on the islands' potential use by timber companies along the riverbanks to form (in conjunction with riverfront lots) a natural boom to store harvested trees. *Id.* at 408. In *United States v. Fuller*, 409 U.S. 488 (1973), then-Justice Rehnquist, writing for the Court, summarized the law by stating: "This Court has held that generally the highest and best use of a parcel may be found to be a use in conjunction with other parcels, and that any increment of value resulting from such combination may

be taken into consideration in valuing the parcel taken." *Id.* at 490 (citing *Olson*, 292 U.S. at 256).

Under these precedents, landowners are routinely awarded compensation for the unique value of their lots for sale to abutting property owners. *Louisiana v. Nassar*, 512 So.2d 1221, 1224 (La. Ct. App. 1987) (compensation awarded based on potential sale of land to an abutting landowner); *City of Lafayette v. Richard*, 549 So.2d 909, 911-12 (La. Ct. App. 1989) (same); *see also Claridge v. New Hampshire Wetlands Board*, 485 A.2d 287, 289 (N.H. 1984) (denying a takings claim due to "evidence in the record that tends to show that the land could be sold to abutters"). Courts award such compensation even where the land must be preserved in its natural state. *See Assateague Island Condemnation Cases*, 356 F. Supp. 357, 360-62 (D. Md.) (compensation awarded for non-developable, marshland tract based on its value for use in assembly with adjacent property), *aff'd*, 487 F.2d 1397-99 (4th Cir. 1973) (unpublished table decisions).

There are a host of reasons for this Court to look to direct condemnation cases in determining the uses that can be considered in assessing a *Lucas* claim. These cases address a similar legal question under the same constitutional provision. They render a fair and nuanced answer that will not please landowners or government agencies in every case. For example, these cases would support the rule that a government purchase offer does not establish market value and thereby defeat a *Lucas* claim. *See United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 636 (1961) (compensation due for a taking is actual value lost, and that value "must be neither enhanced nor diminished by the special need which the government had for it").

Finally, using the principles established by direct condemnation cases in evaluating an inverse condemnation claim promotes fairness. In direct condemnation disputes, landowners argue for consideration of potential uses that

would result in a larger compensation award, whereas in *Lucas* claims landowners seek to show that no beneficial use remains. It would be unfair to require the taxpayers to compensate landowners based on value derived from these uses in direct condemnation cases, but then prohibit the government from relying on such value in defeating an inverse condemnation claim. Simple fairness requires a ruling that the beneficial uses available to petitioners during the moratorium defeat their *Lucas* claim.

D. Petitioners' *Per Se* Rule Would Create Doctrinal Chaos Under The Takings Clause.

This case comes to the Court with the unchallenged ruling that the Tahoe moratorium is not a taking under the *Penn Central* multifactor inquiry. *See* Pet. App. 18-19. The trial court concluded that every factor in the *Penn Central* inquiry cuts in favor of petitioners and against respondents. *Id.* at 88-92. To *amici*'s knowledge, no other court has held that a regulation survived the *Penn Central* inquiry and yet worked a *per se* taking. This section shows that due to the integrated relationship between the *Penn Central* inquiry and the *per se* takings rules, the unchallenged *Penn Central* determination reinforces the conclusion that no *per se* taking occurred under *Lucas*.

Properly understood, the *per se* rules recognized in *Lucas* and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), are simply dispositive applications of the *Penn Central* multifactor inquiry. Under *Penn Central*, a court considers three factors: (1) "the economic impact of the regulation;" (2) "the extent to which the regulation has interfered with distinct investment-backed expectations;" and (3) "the character of the governmental action." *Penn Central*, 438 U.S. at 124. The *per se* rules are specific applications of the first (*Lucas*) and third (*Loretto*) factors. They apply where one of those factors weighs so heavily in favor of a taking that the other factors become academic. These rules

are deemed "categorical" because they make it unnecessary to examine the other factors that inform takings analysis under *Penn Central*.

The integration of the *per se* rules and the multifactor inquiry is evident from both *Loretto* and *Lucas*. In *Loretto*, after noting that *Penn Central* looks to the character of the government action, the Court explained that "when the physical intrusion reaches the extreme form of a permanent physical occupation . . . . 'the character of the government action' not only is an important factor in resolving whether the action works a taking but also is determinative." 458 U.S. at 426. The *Lucas* Court also articulated its *per se* rule within the general context of *Penn Central*. *See* 505 U.S. at 1015. *Loretto* and *Lucas* are not independent tracks of analysis, but instead dispositive applications of the multifactor inquiry that generally drives takings analysis.

The Supreme Court's use of *per se* takings rules follows its use of *per se* rules in other areas of the law. In antitrust law, for instance, the Court employs a multifactor "rule of reason" to evaluate business practices. But it derives rules of *per se* liability "[o]nce experience with a particular kind of restraint enables the Court to predict with confidence that the [multifactor] rule of reason will condemn it." *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 344 (1982). It would be unthinkable to conclude that a trade practice meets the rule of reason but nonetheless constitutes a *per se* violation of the antitrust laws. In the same way, it turns logic on its head to argue that a regulation constitutes a *per se* taking even though it is not a taking under *Penn Central*. *See Loretto*, 458 U.S. at 435 n.12 (comparing the *per se* rules for takings with the *per se* rules in antitrust law).

In short, petitioners' position presents a stark doctrinal anomaly. Just as a business practice cannot survive the rule of reason and yet constitute a *per se* antitrust violation, a land-use regulation cannot survive *Penn Central* and yet

constitute a *per se* taking. Because it is now undisputed that petitioners' *Penn Central* claim fails, their *Lucas* claim necessarily fails as well.[12]

III. PETITIONERS' ATTEMPT TO BLUR THE DISTINCTION BETWEEN PHYSICAL INVASIONS AND LAND-USE REGULATION CONTRAVENES THE ENTIRE CORPUS OF REGULATORY TAKINGS JURISPRUDENCE.

1. Respondents establish that the *First English* ruling is limited to remedies and does not reach the question of when a regulation works a taking. Indeed, the moratorium challenged in *First English* ultimately was held not to constitute a taking. *First English*, 258 Cal. Rptr. at 901-07. There is no need to repeat respondents' demonstration here.[13]

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[12] Petitioners rely heavily on Justice Brennan's dissent in *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981), but it is incongruous to suggest that Justice Brennan would have embraced their extreme *per se* rule. As the author of *Penn Central*, Justice Brennan was keenly aware of the need to avoid sweeping rules of liability in takings cases. *See Penn Central*, 438 U.S. at 124 (regulatory takings analysis entails "ad hoc, factual inquiries" that depend "largely 'upon the particular circumstances'" of the case) (citation omitted). The *San Diego Gas* dissent itself recites the *Mahon* admonition that the takings inquiry is "a question of degree—and therefore cannot be disposed of by general propositions." 450 U.S. at 649 (quoting *Mahon*, 260 U.S. at 415). Moreover, Justice Brennan wrote several opinions that reject conceptual severance, *see, e.g., Penn Central*, 438 U.S. at 130-31; *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979), a result directly at odds with petitioners' position. *See* Pet. App. 20-28.

[13] Petitioners argue that *First English* goes beyond remedial issues, but petitioners' counsel, who also represented the landowners in *First English*, had a much narrower view of *First English* when that case was argued. *See First English*, Brief for Appellant at 5 ("B. The Only Issue In The Case At Bench Is The Proper Remedy For A Regulatory Taking"); *id.* ("this case contains no issue of whether a taking occurred").

It is worth noting, however, that petitioners would treat regulatory protections even more severely than physical invasions. Under their reading of *First English*, a temporary restriction on beneficial use is a *per se* taking, even though under *Loretto* a temporary physical invasion is subject to *Penn Central*'s multifactor inquiry. *Loretto*, 458 U.S. at 435 n.12. Petitioners make little effort to justify this odd result.

2. In addition to mischaracterizing the *First English* holding, petitioners argue that *First English* worked a sea change by merging the liability standards for physical invasions and land-use regulations. To be sure, *once a taking is established*, there is no difference between physical occupations and land-use restrictions, for in either case the Fifth Amendment requires compensation. *See First English*, 482 U.S. at 314-22. But with respect to the question of whether a taking has occurred, petitioners could not be more wrong in suggesting that there is no difference between physical occupations and land-use regulation.

Takings law always has distinguished physical invasions from land-use restrictions. For the first 150 years of our nation's history, the Takings Clause applied only to the direct condemnation or physical appropriation of property. *Lucas* 505 U.S. at 1014 ("Prior to Justice Holmes's exposition in [*Mahon*] it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, or the functional equivalent of a 'practical ouster of [the owner's] possession.'") (citations omitted).

In *Mahon*, Justice Holmes explained that a regulation works a taking only where it "goes too far." 260 U.S. at 415. Land-use regulations that simply "adjust[] the benefits and burdens of economic life to promote the common good" are far less likely to work a taking than a physical invasion. *Penn Central*, 438 U.S. at 124. In fact, a land-use control effects a taking only where the regulation approximates a physical appropriation. *See Williamson County Reg'l Planning*

Comm'n v. Hamilton Bank, 473 U.S. 172, 199 (1985) (in a regulatory takings case, the Court's task is "to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property").

In contrast to the deferential standard for land-use regulation, a government-compelled permanent physical occupation constitutes a *per se* taking without regard to its economic impact. *Loretto*, 458 U.S. at 434-35. In requiring *per se* treatment, the *Loretto* Court reaffirmed "the distinction between a permanent physical occupation . . . and a regulation that merely restricts the use of property." *Id.* at 430. *Loretto* explains that the special treatment given to a physical invasion derives from the right to exclude, "traditionally . . . considered one of the most treasured strands in an owner's bundle of property rights." *Id.* at 435.

The Court has reaffirmed the distinction between physical invasions and land-use regulations time and again. Earlier this year, the *Palazzolo* Court observed that physical takings are "[t]he clearest sort of taking" that require compensation even for a "minimal" intrusion, while a regulation requires compensation only where it "goes too far" under *Mahon*. *Palazzolo*, 121 S. Ct. at 2457. The distinction between invasions and regulation is so clear that the Court unanimously has held that a regulatory taking issue is not fairly included within a question presented concerning a physical taking. *Yee v. City of Escondido*, 503 U.S. 519, 537 (1992) ("Consideration of whether a regulatory taking occurred would not assist in resolving whether a physical taking occurred as well. . . . [The two issues] exist side by side, neither encompassing the other.").

In arguing that regulatory takings should be treated like physical takings, petitioners rely on wartime takings cases, but they entirely disregard *Loretto*'s careful treatment of two key wartime cases: *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951), and *United States v. Central Eureka Mining*

Co., 357 U.S. 155 (1958). The *Loretto* Court explained that in *Pewee Coal*, the Court found a taking where the government took possession of a coal mine to prevent a strike of coal miners. *Loretto*, 458 U.S. at 431. In *Central Eureka*, however, the Court found no taking where the government required gold mines to cease operating for almost three years. *Loretto*, 458 U.S. at 431-32 (citing *Central Eureka*, 357 U.S. at 165-66). The *Loretto* Court emphasized that the temporary denial of all use in *Central Eureka* stood in sharp contrast to the physical invasion in *Pewee Coal*. *Loretto*, 458 U.S. at 431-32.

In short, petitioners' blurring of physical invasions and regulatory restrictions is inconsistent with the entire body of takings jurisprudence that preserves the distinction.

3. Petitioners' proposed merger of physical and regulatory takings also could lead to *per se* treatment of other workaday land-use restrictions. For example, *amicus* Institute for Justice (Br. 17-20) argues that the Court should overrule *Penn Central* insofar as it holds that in evaluating the economic impact of a regulation, courts should look to the regulation's effect on the claimant's entire parcel, not just the affected portion. As this Court recognizes, however, *Penn Central*'s parcel-as-a-whole rule is critical to a fair and measured application of the Takings Clause. Without it, setback requirements and other reasonable land-use practices would be compensable and thus financially ruinous to impose. *See, e.g., Keystone*, 480 U.S. at 498 (without the parcel-as-a-whole rule, "one could always argue that a setback ordinance requiring that no structure be built within a certain distance from the property line constitutes a taking because the footage represents a distinct segment of property for takings law purposes").

Amicus Institute for Justice's extraordinary proposal to overrule the parcel-as-a-whole rule is the logical conclusion of petitioners' illicit merging of liability standards for

physical invasions and land-use controls. Because a government-compelled, permanent physical occupation is a taking no matter how small the intrusion, a merging of liability standards would require compensation for any denial of use on any portion of a parcel, no matter how small. Nothing in the Takings Clause warrants this extreme result.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

TIMOTHY J. DOWLING
DOUGLAS T. KENDALL
COMMUNITY RIGHTS COUNSEL
1726 M Street, N.W.
Suite 703
Washington, D.C. 20036
(202) 296-6889

RICHARD RUDA *
Chief Counsel
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850

* Counsel of Record for the *Amici Curiae*

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IN THE

Supreme Court of the United States

TAHOE SIERRA PRESERVATION COUNCIL, INC., *et al.*,

Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* SCIENTISTS IN SUPPORT OF RESPONDENTS

KARL M. MANHEIM*
DANIEL P. SELMI
Attorneys for Amici Curiae Scientists
919 S. Albany Street
Los Angeles, California 90015
(213) 736-1106

**Counsel of Record*

170582

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INTEREST OF *AMICI CURIAE*[1]

A substantial body of scientific knowledge about the ecology of Lake Tahoe formed the backdrop both for the land use moratorium now being considered by this Court and for the District Court's decision. That knowledge plainly revealed the peril that the lake faces, and the difficult planning choices confronted by Respondent Tahoe Regional Planning Agency ("TRPA").

The knowledge on Lake Tahoe differs substantially from that available in the mid-1960's, when concern about changes to the lake first arose. There now exists a well-developed understanding of the processes that are affecting the lake and the likely outcome if current trends continue. *Amici* are scientists from throughout the United States and abroad who have special knowledge of these scientific issues concerning Lake Tahoe. They have devoted their professional lives to the study of natural resources such as Lake Tahoe, with particular emphasis on the ecological effects of pollution on those resources.

This scientific information, generally reflected in the District Court's findings of fact, leads to a single conclusion: the lake environment has deteriorated rapidly, and the lake was and continues to be at a critical point in its history. Unless regulatory action arrests current trends, the future of the lake's crystalline clarity is in grave doubt.

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1. Pursuant to Rule 37.3(a) of the Supreme Court's Rules, this brief is filed with the consent of all parties and, such consents have been lodged with the Court. Pursuant to Rule 37.6, *Amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than *amici*, their counsel, and their offices, contributed monetarily to the preparation or submission of this brief.

The scientific information confirms the need for the planning moratorium undertaken by Respondent. Given the ecological state of Lake Tahoe, the moratorium was essential to developing a land use plan that would minimize further harm to the lake while allowing some development in a manner that would not jeopardize the lake's future. Those choices were extraordinarily important and difficult. Thus, it is not surprising that, as the District Court expressly found, Respondent could not have undertaken its regulatory efforts more rapidly than it did in this case.

Additionally, the moratorium prevented an interim "rush to development" before a land use plan could be written and adopted to guide future development. If that "rush" had occurred, it could only have greatly decreased the chances of saving the lake.

Amici submit that the Court should carefully consider these consequences of the scientific knowledge. They strongly suggest the importance of preserving the right of Respondent TRPA to employ a temporary moratorium where essential without fear of liability.

IDENTITY OF *AMICI*

Amici are as follows:

Thomas Dunne is a Professor at the Donald Bren School of Environmental Science and Management, University of California, Santa Barbara. Dr. Dunne conducts field research and theoretical studies of watersheds, hillslope processes, and fluvial geomorphology, with application of hydrology and geomorphology to landscape management. He directs major field research projects in

Kenya and in the Amazon River Basin, Brazil. He is a member of the National Academy of Sciences.

Grachev Mikhail Alexandrovich is correspondent member of the Russian Academy of Sciences, Director of the Limnological Institute of the Siberian Branch of RAS, and organizer of the Baikal International Center for Ecological Research. Professor Grachev directs multi-disciplinary research on the greatest and most ancient fresh-water body on earth, Lake Baikal, in East Siberia. He has authored or co-authored more than 120 scientific papers, and is the winner of the State Award of Russia and of the Karpinsky Award donated by the German Toepfer Foundation. He is directly involved in studies of the changes in the ecological system of Lake Baikal due to changing climate and environment.

Luna B. Leopold is Professor Emeritus of Earth Science and of Landscape Architecture at the University of California, Berkeley. Dr. Leopold is the former Director of Water Resources of the United States Geological Survey. Dr. Leopold is a recipient of the National Medal of Science and is a member of the National Academy of Sciences. He has authored numerous books and journal articles in the fields of hydrology and geomorphology, and their applications in the fields of land use and environmental management.

Gene B. Likens is founder and Director of the Institute of Ecosystem Studies at the New York Botanical Garden, Millbrook, New York. Dr. Likens is credited with the discovery and illumination of the problem of acid rain in North America. He has received the prestigious Tyler Prize for Environmental Achievement. He has written

or edited 14 books and more than 400 research papers. Dr. Likens also holds faculty appointments at Yale, Rutgers, and Cornell Universities, and is a member of the National Academy of Sciences.

John Melack is a professor in the Bren School of Environmental Science and Management and in the Department of Ecology, Evolution and Marine Biology at the University of California, Santa Barbara. Dr. Melack has a research program in limnology, biogeochemistry, aquatic ecology and remote sensing, including active studies of alpine and saline lakes in the Sierra Nevada. He has published over 170 scientific papers. Currently, he is president of the International Society for Salt Lake Research, is a member of the National Academy of Sciences Committee on Geophysical and Environmental Data, and is a member of the Board of Directors of the American Society of Limnology and Oceanography.

Glenn C. Miller is a Professor of Environmental and Resource Science at the University of Nevada, Reno, and Director of the Graduate Program in Environmental Sciences and Health. He is also the Director of UNR's Center for Environmental Sciences and Engineering. His research interests center on the fate and transport of organic compounds in water, soils and the atmosphere. Current areas include studies on emissions of hydrocarbons from watercraft at Lake Tahoe. He is a member of the American Chemical Society, the American Association for the Advancement of Science, and the American Geophysical Union.

Peter B. Moyle is a Professor in the Department of Wildlife, Fish, and Conservation Biology at the

University of California, Davis. Dr. Moyle is an expert in the ecology and conservation of freshwater fishes, with a special interest in threatened and endangered populations in California. Much of his research has concerned fishes of the Sierra Nevada, California. He is author of Inland Fishes of California (2d ed. 2002), the definitive review of the biology of California fishes.

Max Tilzer is Professor of Aquatic Ecology, Faculty of Biology, Universitat Konstanz, Germany. Dr. Tilzer directed the Limnological Institute in Konstanz from 1980 to 1992 and served as principal investigator of the special research project "Cycling of Matter in Lake Constance (1986-1992)." He also served as Director of the Wegner Institute for Polar and Marine Research, Bremerhaven. He is currently a member of the German Advisory Council on Global Change.

Eugene B. Welch is Professor Emeritus of Civil and Environmental Engineering at the University of Washington. Dr. Welch is a recognized expert in the field of water quality management. He is a co-founder and past president of the North American Lake Management Society and past president of the Washington State Lake Protection Association. He and his students have published more than 95 peer reviewed research papers on limnology and lake management. Dr. Welch is author of the text Ecological Effects of Wastewater and co-author of the treatise, Restoration and Management of Lakes and Reservoirs, both in their second edition.

Robert G. Wetzel is Professor of Environmental Science and Engineering at the University of North Carolina, Chapel Hill, and Erlander Professor at the University of

Uppsala, Sweden (lifetime appointment). Dr. Wetzel is currently General Secretary of the International Association of Theoretical and Applied Limnology and Oceanography, and is on the board of the Ecological Society of America. He is an elected member of the American Academy of Arts and Sciences, and the Royal Danish Academy of Sciences. He has authored or co-authored 16 books and has over 400 articles in scientific journals and books.

M. Gordon Wolman is Professor in the Department of Geography and Environmental Engineering at the Johns Hopkins University, Baltimore, Maryland, where he also holds a joint appointment in the Department of Environmental Health Sciences. Dr. Wolman is a member of the National Academy of Sciences, where he has served on numerous committees and boards, and is a past president of the Geological Society of America. He is also a member of the Geophysical Union, where he is a past president of the Section on Hydrology. Dr. Wolman has held visiting appointments at a variety of institutions, including the Universities of Texas, Wisconsin, London, Virginia, Arizona, and Washington. Dr. Wolman's principal research interests are in the areas of geomorphology, river channel processes, hydrology, Quaternary geology, and physical geography.

STATEMENT OF FACTS

Amici adopt the Statement of Facts in the brief of Respondents.

ARGUMENT

I. THE BODY OF SCIENTIFIC EVIDENCE ON LAKE TAHOE'S ECOLOGY DOCUMENTS THE DANGER POSED TO THE LAKE AND SUPPORTS THE DISTRICT COURT'S FACTUAL FINDINGS CONCERNING THE NEED FOR THE MORATORIUM.

A. Scientists Have Compiled a Comprehensive Body of Knowledge About Lake Tahoe and About the Ecological Damage to the Lake.

Since the late 1960's, independent scientists from academia and from federal and state agencies have intensively studied the Lake Tahoe Basin. Both the Tahoe Research Group, led by Dr. Charles Goldman (a witness for Respondents in this case), and the State/Federal Tahoe Interagency Monitoring Program have carried out extensive, long-term studies of the basin. The research is multi-disciplinary; it includes geology, soil science, hydrology, and limnology (the science of freshwater lakes and streams, covering both physical and biological properties).[2]

As a result, a rich body of information, which the District Court expressly termed "credible" (App. at 82), provides a baseline for examining the ongoing changes to the lake and predicting the outcome of current trends. Furthermore, since the date of the trial new analyses have further documented these changes.[3]

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2. *See* Robert G. Wetzel, *Limnology: Lake and River Ecosystems* (2001).

3. *See* Alan D. Jassby, Charles R. Goldman, John E. Reuter, Robert C. Richards, and Alan C. Heyvaert, *Lake Tahoe: Diagnosis and Rehabilitation of a Large Mountain Lake*, in Great Lakes of the World; Food-Web, Health and Integrity (2001) (reviewing the main limnological findings to date for Lake Tahoe).

B. Five Principal Scientific Facts Concerning the Lake's Ecology, Which the District Court Recognized in Its Factual Findings, Underlie the Threats to the Lake.

1. Increased Deposits of Nitrogen and Phosphorus Are Causing the Lake To Change From an Oligotrophic to a Eutrophic Condition.

Lake Tahoe is unique because of its size, depth, and clarity.[4] Even as of 1981, well after Lake Tahoe's degradation had begun, the lake was classified among the clearest large lakes in the world. Few large lakes fall into this class.[5]

It is axiomatic that conditions outside of a lake affect its ecology.[6] Until mid-century, Lake Tahoe was "oligotrophic," *i.e.*, very low in nutrients, clear, and lacking a steep temperature gradient that would prevent deep circulation and mixing. Since then, however, the lake has been changing toward a "eutrophic" condition, a process characterized by

4. *See* Charles R. Goldman and Alexander J. Horne, *Limnology* 395, 401 (1983).

5. *See* Gerald A. Cole, *Textbook of Limnology* 192, Table 9-2 (4th ed. 1994).

6. W. Thomas Edmondson, *The Uses of Ecology: Lake Washington and Beyond* 59 (1991) ("The biological character of a lake is affected by a set of interconnected physical and chemical influences from outside."). Dr. Edmondson, who was one of the world's leading authorities on lakes, was one of the present group of Amici in the brief filed before the court below in this matter. He has since passed away.

an increase in algal growth.[7] As algae grows during eutrophication, the lake's clarity is reduced, and oxygen is depleted in the lake's depths. Fish and their habitat also are directly harmed. Since the time of trial, additional analyses have documented the continuing decline in the lake's transparency and its related ecological health.[8]

The process of eutrophication is scientifically well-understood. Nitrogen and phosphorus combine with carbon during photosynthesis to produce algae.[9] A critical result of excessive algal production is depletion of oxygen in water, a condition that jeopardizes the survival of fish.[10] This condition is already detectable in the waters near the bottom of Lake Tahoe.

As the evidence at trial indicated, natural eutrophication would take tens of thousands of years. Transcript 4:749. In

7. G. Evelyn Hutchinson, *A Treatise on Limnology, Vol. 1* 284 (defining eutrophication) (1957).

8. *See* Alan D. Jassby, Charles R. Goldman, John E. Reuter, and Robert C. Richards, *Origins and Scale Dependence of Temporal Variability in the Transparency of Lake Tahoe, California-Nevada*, 44(2) Limnology and Oceanography 282 (1999) (discussing seasonal changes in the transparency of Lake Tahoe).

9. *See, e.g.*, Stanford L. Loeb, *Algal Biofouling of Oligotrophic Lake Tahoe: Causal Factors Affecting Production*, in *Algal Biofouling*, 159, 171 (L.V. Evans and K.D. Hoagland ed. 1986).

10. Goldman & Horne, *supra* n.4, at 265 ("One of the most serious effects of eutrophication in lakes is its effect on depleting oxygen in the hypolimnion. This may result in the loss of deepwater spawning grounds and the elimination of some benthic invertebrates for food . . ."). *See also id.* at 97-98, 266-67.

Lake Tahoe, however, algal growth is increasing rapidly at the alarming average rate of 5% per year. Transcript 4:763. Significant amounts of the nutrients nitrogen and phosphorus, the "fertilizer" that produces algae, are being transported into the lake.[11] The data indicates that phosphorus is now the most critical or "limiting" factor in algal production; the lake currently contains sufficient amounts of nitrogen to increase algal formation above present rates if additional phosphorus becomes available.[12]

Amici emphasize that the increased algal formation from nutrients, with its concomitant threat to the lake's unique clarity, fish, and wildlife, is not a hypothesis. It has been documented scientifically and is well underway.

2. Human Development in the Lake Tahoe Basin is Causing The Damaging Increase in Nutrient Levels.

The District Court found that "[t]he evidence clearly shows that this increase in nutrient levels is caused by increased development in the Lake Tahoe Basin." App. at 63. Given the basin's ecology, this conclusion is irrefutable.

11. Robert N. Coats and Charles R. Goldman, *Patterns of Nitrogen Transport in Streams of the Lake Tahoe Basin, California-Nevada*, 37 Water Resources Research 405-15 (2001) (analyzing ten years of data on nitrogen transport at Lake Tahoe).

12. Charles R. Goldman, Alan D. Jassby, and Scott H. Hackley, *Decadal, Interannual and Seasonal Variability in Enrichment Bioassays at Lake Tahoe, California-Nevada, USA*, 50 (7-8), Can. J. Fish, Aquat. Sci. 1489, 1491 (1993) ("the long term [data] therefore indicate that a shift has taken place from colimitation by N and P to limitation primarily by P.").

Research has firmly established the nexus between development of environmentally sensitive lands and increased nutrient levels in lakes.[13] All of the lands within TRPA's jurisdiction drain into Lake Tahoe. Artificial disturbance of land greatly increases the supply of nutrients to streams, and those streams in turn transport the elevated nutrient loads to the lake.[14]

This disturbance occurs in a variety of ways.[15] Of foremost importance is the destruction of vegetation. Vegetation holds nitrogen in place, preventing it from

13. *See, e.g.*, W.M. Lewis, J.F. Saunders III, D.W. Crumpacker, Sr. & C. Brendecke, *Eutrophication and Land Use: Lake Dillon, Colorado* (1984) 3 ("[R]elatively little human presence or human activity is required to double or triple the total phosphorus concentrations" in Lake Dillon) and 145-48 (analyzing the phosphorus and nitrogen yields from various levels of development); T. Hirose and N. Kurmoto, *Stream Water Quality as Influenced by Land Use Patterns in the Kakioka Basin, Japan*, 10 J. Environ. Qual. 184 (1981).

14. *See* R.C. Loehr, *Characteristic and Comparative Magnitude of Non-point Sources*, 46(8) J. Water Pollut. Control. Fed. 1849 (1974); Thomas Dunne and Luna B. Leopold, *Water in Environmental Planning* 508 (1978) ("In its natural state, the soil covering a hillslope remains in a state of approximate equilibrium for a very long period of time") and 510 ("Human occupance of land almost always increases the rate of hillslope erosion by significant and sometimes catastrophic amounts").

15. *See* Tahoe Regional Planning Agency, *Study Report for the Establishment of Environmental Threshold Carrying Capacities* (October 1982) (Defendants' Exhibit 237); Luna B. Leopold, M. Gordon Wolman, and John P. Miller, *Fluvial Processes in Geomorphology* 47-48 (1964). The removal of vegetation and exposure of the soil is especially critical. *Fluvial Processes*, 47 ("The data . . . show that for a given precipitation the quantity of sediment eroded from fallow land or land in row crops is roughly 80 times the amount eroded from grasslands.").

leaching from the soil into the streams and the lake. Vegetation also protects against erosion of soil particles, which constitute the lake's primary source of phosphorus. When the natural vegetation is removed by development, both the loss of nitrogen storage and erosion of phosphorus-rich soil greatly accelerate the transport of nutrients to Lake Tahoe.

The creation of impervious surfaces such as roads likewise hastens the flow of nutrients to the lake. Impervious surfaces prevent rain and snowmelt from seeping underground where plant roots can strip out the nitrogen. Instead of water moving to the lake as groundwater, precipitation becomes nitrogen-rich surface flow. Furthermore, because the velocity of surface flow far exceeds that of groundwater, the flow of nutrients is vastly accelerated.

The characteristics of the chemical phosphorus contribute to this erosive cycle. Phosphorus adheres tightly to sediment and is adsorbed onto sediment particles. As a result, when disturbances to land increase the amount of sediment, a corresponding increase will occur in the amount of phosphorus reaching the lake.[16] A close relationship also exists between sediment yield from watersheds and the phosphorus in that sediment. Research has found a marked increase in the phosphorus concentration in streams located in developed areas.[17]

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16. Lorin K. Hatch, John E. Reuter and Charles R. Goldman, *Stream Phosophorus Transport in the Lake Tahoe Basin, 1989-1996*, in *Environmental Monitoring and Assessment*, 69 Environmental Monitoring and Assessment 63-83 (2001) (discussing delivery of phosphorus to the lake).

17. Earl R. Byron and Charles R. Goldman, *Land-Use and Water Quality in Tributary Streams of Lake Tahoe, California-Nevada*, (Cont'd)

Given the relationship between disturbance of land and the flow of nutrients to the lake, an increase in algal formation will occur in areas of the lake located near development projects. As Dr. Goldman testified at trial, the maximum planktonic algal growth found in his research was located near areas of intense development. Transcript 4:774. Thus, the District Court correctly concluded that "algal growth is more noticeable in areas of the lake near larger concentrations of human habitat and development." App. at 63.

3. Development of "High Hazard Lands" and "Stream Environment Zones" Poses the Greatest Threat to the Lake.

A third scientific principle central to the present case is that the amount of harm caused by development will vary with land characteristics. The types of land susceptible to greater erosion, and thus to increased delivery of nutrients to lakes, are well-known. The principal characteristic is steepness of slope. As land gets steeper, the velocity of water running off of it increases, and with it the erosive force of that water. Thus, steeper lands present a significant danger to Lake Tahoe, as field sampling at Lake Tahoe has demonstrated.[18]

(Cont'd)
18 J. of Envtl. Quality 84, 86 (1989). The research analyzed monitoring data for ten streams entering Lake Tahoe. The watersheds of these streams contained both High Hazard and Low Hazard lands with varying degrees of disturbance, and land covered by impervious surfaces from urbanization. Figures 1 through 4 show that disturbed/covered High Hazard lands deliver significant increases in nitrite-N, nitrate-N, soluble reactive phosphorus, and total phosphorus.

18. *See, e.g.*, *Water in Environmental Planning*, *supra* n.14, 511 ("Rainsplash erosion is particularly important on steep slopes devoid (Cont'd)

Another key factor is soil quality. Some soils shed water easily, while others tend to absorb water. Obviously, as soils repel more water, the potential for more nutrients to reach the lake increases.

These principles underlie the land use classifications used by TRPA.[19] Those classifications are based on environmental characteristics: slope, soil type, vegetative cover, and geomorphic context. *See* App. at 66. The "High Hazard" lands have characteristics that make them much more susceptible to erosion and transportation of sediment containing nutrients.[20]

Moreover, a specific type of wetland area, the "Stream Environment Zone" ("SEZ"), plays a special role in introducing nutrients to lakes. SEZ lands, which typically are marsh-like in

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(Cont'd)
of vegetation . . ."); *Fluvial Processes in Geomorphology*, *supra* n.15, 359 ("Erosion by surface runoff might be expected to be greatest on long steep slopes with low infiltration capacity. Empirical data . . . appear to verify this.").

19. *See* Robert G. Bailey, *Land Capability Classification of the Lake Tahoe Basin, California-Nevada* (U.S. Dep't of Agriculture, Forest Service) (1974) (ER 11). This report and accompanying map describe the scientific basis for TRPA's classification of lands according to their relative capacity to withstand and recover from impacts of urban development (*i.e.*, de-vegetation, grading, trenching, and creation of impervious surfaces).

20. *Land-Use and Water Quality in Tributary Streams of Lake Tahoe, California-Nevada*, *supra* n.17, 86 ("Under conditions of increasing degree of human disturbance . . . the extent of disturbance is significantly related to runoff water quality . . .") This study is based upon direct measurement of water runoff from lands with varying capability hazard designations.

nature, act as storehouses for nutrients. Disturbance of SEZ lands releases stored nutrients, causing direct harm to the lake.

Additionally, as storm water spreads over these wetlands, they tend to filter out nutrients,[21] particularly phosphorus. Because phosphorus attaches itself to soil, the filtering and settling function performed by SEZ lands provides an important barrier against the deposit of more phosphorus into Lake Tahoe. Thus, TRPA's recognition of the dangers posed by disturbance of High Hazard and SEZ lands is entirely justified.

4. If These Adverse Ecological Changes Had Not Been Addressed, They Would In Practical Terms Have Become Irreversible.

The processes described above have been observed in other lakes throughout the world and are generally well-understood.[22] Human-induced eutrophication has led to the degradation and, in some cases, the destruction of similar valuable environments throughout the world. For example, the Zurich See experienced problems like those at Lake Tahoe[23], as have lakes in Canada and the Eastern United States.[24]

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21. *A Treatise on Limnology*, *supra* n.7, 231 (defining the role of wetlands).

22. *See, e.g.*, Alexander J. Horne and Charles R. Goldman, *Limnology* 104-06 (2d ed. 1994) (discussing how erosion caused by human activity supplies sediment to receiving waters) and 509 ("Two prominent features of eutrophication are excess nutrient levels and low oxygen content of lake bottom waters.")

23. *See, e.g.*, L. Minder, *Studien Uber den Sauerstoffgehalt des Zurichsees*, 3 Arch. Hydrobiol. Suppl. 107 (1923).

24. John R. Vallentyne, *The Algal Bowl: Lakes and Man*, in 2 Misc. Special Publ., Fisheries and Marine Service, Environment Canada (1974).

In the present case, the District Court concluded that if the ecological processes affecting Lake Tahoe continue, the changes will become irreversible. App. at 62. This conclusion is inescapable for two reasons. First, the lake will retain additional nutrients deposited in it for at least 70 years, with water exchanging over a period of about 700 years. This long retention period greatly hinders, and in all likelihood prevents, meaningful remedial efforts. Transcript 4:750.

Moreover, an important reaction will occur at some point in the lake's process of algal development. As algal growth increases, lack of oxygen near the lake bottom will cause a ferric iron "cap" located there to become soluble ferrous oxide. Thereafter, a so-called "autocatalytic reaction" is highly likely. In that reaction, great amounts of nutrients, currently "locked-in" by the ferric iron cap, will be released from sediments at the lake's bottom, increasing the rate of algal growth. As Dr. Goldman testified, once that reaction occurs, the lake will be irremediably damaged. Transcript 4:750. The deep waters will no longer support lake trout, the lake's most important sports fish. Transcript 4:751-52. There is already measurable evidence of the decline of oxygen in the lake's deep water.

5. The Change to the Lake's Color Is Merely One Visible Sign of the Fundamental Transformation of the Lake's Ecology.

The most apparent sign of change to Lake Tahoe is the loss of about one-third of its transparency in the last 40 years.[25]

25. Charles R. Goldman, *Anthropogenic Impacts on Oligotrophic Lake Systems Emphasizing Lakes Tahoe and Baikal*, in *Environmental Protection and Lake Ecosystems*, 385-98 (H. Sund and Y. Xiaogan eds. 1994).

Amici emphasize, however, that this loss of transparency is only one visible sign of the ongoing ecological changes to the lake. Nutrient loading from the surrounding watershed is causing increased algal growth and a progressive loss in transparency. The inorganic turbidity created by the discharge of small particles into the lake is further reducing transparency.[26]

Other evidence of algal growth is the presence of floating mats of periphyton (*i.e.*, previously attached algae) that did not appear before in the lake. The algae threatens changes to fish populations, particularly to important salmonid species. When algae dies, it decomposes and emits a "rotten-egg" smell. Finally, blooms of attached algae have washed up on beaches and in marinas on the lake.

II. THE SCIENTIFIC EVIDENCE OF THE LAKE'S INCREASING DEGRADATION COMPLICATES THE PLANNING RESPONSE AND JUSTIFIES THE NEED FOR A MORATORIUM IN WHICH TO COMPLETE THAT PLANNING.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), this Court adopted a *per se* rule for regulatory takings in situations where a landowner was deprived of all

26. *See Origins and Scale Dependence of Temporal Variability in the Transparency of Lake Tahoe, California-Nevada*, *supra*, n.8, at 289 ("... [T]he snowmelt in the spring results in increasing streamflow and increasing suspended sediment discharge to the lake."); *see generally* Charles R. Goldman, *Primary Productivity, Nutrients, and Transparency During the Early Onset of Eutrophication in Ultra-Oligotrophic Lake Tahoe, California-Nevada*, 33(6 part 1) J. of Limnology and Oceanography 1321, 1331 (1988).

economic use of his or her property. In doing so, the *Lucas* opinion explained why justifications for the regulation would be irrelevant to a takings analysis in such situations. Most importantly, the Court first identified what it termed the "functional basis" for permitting government regulation that affects property values: that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law . . ." *Id.* at 1003 (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 413). However, the Court then concluded that this functional basis for regulation did not apply "to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses." *Id.*

Petitioners now seek to extend the *per se* rule adopted in *Lucas* to all moratoria, which by definition deprive a landowner of the property's use for a limited period of time. *Amici* submit that the scientific evidence concerning the peril faced by Lake Tahoe demonstrates why such an extension would imperil the planning process and thereby jeopardize, in the words of *Lucas*, the "functional basis" of regulation.

First, the evidence indicated that the threat to the lake's renowned clarity arises from development activities around the lake, and that some lands pose more of a threat to the lake than others. To accurately address the threat, and to minimize regulation on lands that do not pose a threat, TRPA needed very precise information about the characteristics of all land surrounding the lake. In short, the information-gathering part of the regulatory process was necessarily extensive.

Second, the science dictated that the regulatory body would have to make difficult choices. TRPA was required to determine which lands posed the greatest threat to the lake and how the regulatory burden should be distributed. This task, which required significant public input, necessarily required some time to complete. The District Court, in an unchallenged finding, expressly concluded that the amount of time spent by TRPA in completing its work was reasonable. App. at 115.

Third, the scientific evidence indicates that TRPA had little, if any, margin for error in formulating the regulatory plan. The lake, crystal clear for thousands of years, is currently losing is clarity at the truly alarming rate of 5% per year. Unless the agency chose the correct instruments to arrest this decline, the scientific evidence indicated that additional damage would inevitably occur.

In that event, the decline in the lake's clarity would be virtually irreversible. There would be no "second chance."

Finally, unless TRPA could prevent development while it completed its planning, the likelihood of saving the lake from precipitous degradation would be greatly reduced. Faced with the prospect of impending regulation, landowners would likely "rush to develop" in the absence of a moratorium. The new development would inevitably cause an increase in the discharges to the lake, thus further complicating the regulatory effort. At the same time, the agency's resources would be divided between a planning effort designed to comprehensively address the lake's future, and a need to process a flood of individual development approvals.

Courts have upheld development moratoria for over 75 years. In many of those cases, they have observed that a moratorium may be necessary to preserve the integrity of the planning process being undertaken and to avoid a "rush to develop" that would undermine the very plan being created. *See, e.g., State ex rel. SCA Chemical Waste Services, Inc. v. Konigsberg*, 636 S.W.2d 430, 434 (Tenn. 1982) ("it would be destructive of the plan if, during the period of its incubation and consideration, persons seeking to evade its operation could be permitted to enter upon a course of construction that would progress so far as to defeat, in whole or in part, the ultimate execution of the plan"); *City of Dallas v. Crownrich*, 506 S.W.2d 654, 660 (Tex. App. 1974) (upholding an interim prohibition on building permits to avoid "a race of diligence to the city hall by property owners attempting to place structures upon their land that would be out of accord with the surrounding property under the new zoning laws"); and *Downham v. City Council of Alexandria*, 58 F.2d 784, 788 (E.D. Va. 1932) (without interim regulation, "any movement by the governing body of a city to zone would, no doubt, frequently precipitate a race of diligence between property owners, and the adoption later of the zoning ordinance would in many instances be without effect . . . like locking the stable after the horse is stolen.") *See generally* Julian Conrad Juergensmeyer and Thomas E. Roberts, *Land Use Planning and Control Law* 233 (1998) ("Protection of the planning process requires this [interim ordinance freezing development] for without it developers could defeat the plan before it begins by inconsistent vested uses.") In short, to use the terminology of *Lucas*, courts have upheld moratoria to ensure the "functional basis" of regulation.

Before this Court concludes that the hundreds of moratoria imposed by local governments in the aid of planning actually effected takings, the Court must carefully

consider the impact of such a ruling on the government's ability to regulate effectively. The scientific evidence concerning Lake Tahoe leads to only one conclusion: such a ruling would gravely jeopardize TRPA's ability to act decisively and effectively in a manner that would preserve the lake.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

KARL M. MANHEIM*
DANIEL P. SELMI
Attorneys for Amici Curiae Scientists
919 S. Albany Street
Los Angeles, California 90015
(213) 736-1106

**Counsel of Record*

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In the

SUPREME COURT OF THE UNITED STATES

TAHOE-SIERRA PRESERVATION COUNCIL, INC.,
Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY,
Respondent.

On Writ of Certiorari
To the Court of Appeals for the Ninth Circuit

BRIEF OF THE STATES OF VERMONT, ALASKA, ARIZONA, CONNECTICUT, FLORIDA, HAWAII, IOWA, LOUISIANA, MARYLAND, MASSACHUSETTS, MONTANA, NEW JERSEY, NEW YORK, NORTH CAROLINA, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, TEXAS, AND WASHINGTON AND THE COMMONWEALTH OF PUERTO RICO, AS AMICI CURIAE IN SUPPORT OF RESPONDENT

WILLIAM H. SORRELL
Attorney General of Vermont
* BRIDGET ASAY
Assistant Attorney General
109 State Street
Montpelier, Vermont 05609
(802) 828-3181

* *Counsel of Record*

[additional counsel listed on inside cover]

BEST AVAILABLE COPY

BRUCE M. BOTELHO
Attorney General of Alaska
P.O. Box 110300
Juneau, AK 99811

JANET NAPOLITANO
Attorney General of Arizona
1275 West Washington
Phoenix, AZ 85007-2926

RICHARD BLUMENTHAL
Attorney General of Connecticut
55 Elm Street
Hartford, CT 06141

ROBERT A. BUTTERWORTH
Attorney General of Florida
The Capitol, PL-01
Tallahassee, FL 32399-1050

EARL I. ANZAI
Attorney General of Hawaii
425 Queen Street
Honolulu, HI 96813

THOMAS J. MILLER
Attorney General of Iowa
Hoover State Office Building
Des Moines, IA 50319

RICHARD P. IEYOUB
Attorney General of Louisiana
Department of Justice
P.O. Box 94095
Baton Rouge, LA 70804-9005

J. JOSEPH CURRAN, JR.
Attorney General of
Maryland
200 St. Paul Place
Baltimore, MD 21202

THOMAS F. REILLY
Attorney General of
Massachusetts
One Ashburton Place
Boston, MA 02108

MIKE MCGRATH
Attorney General of Montana
215 N. Sanders
P.O. Box 201401
Helena, MT 59620-1401

JOHN J. FARMER, JR.
Attorney General of New Jersey
R.J. Hughes Justice Complex
25 Market Street
P.O. Box 080
Trenton, NJ 08625

ELIOT SPITZER
Attorney General of New York
120 Broadway
New York, NY 10271

ROY COOPER
Attorney General of North
Carolina
P.O. Box 629
Raleigh, NC 27602

W. A. DREW EDMONDSON
Attorney General of Oklahoma
2300 N. Lincoln Boulevard
Suite 112
Oklahoma City, OK 73105-4894

HARDY MYERS
Attorney General of Oregon
1162 Court St. N.E.
Salem, OR 97310

ANABELLE RODRÍGUEZ
Attorney General of the
Commonwealth of Puerto Rico
P.O. Box 192
San Juan, PR 00902-0192

SHELDON WHITEHOUSE
Attorney General of
Rhode Island
150 South Main Street
Providence, RI 02903

MARK BARNETT
Attorney General of
South Dakota
500 East Capitol Avenue
Pierre, SD 57501-5070

PAUL G. SUMMERS
Attorney General of Tennessee
425 Fifth Avenue North
Nashville, TN 37243

JOHN CORNYN
Attorney General of Texas
P.O. Box 12548
Austin, TX 78711-2548

CHRISTINE O. GREGOIRE
Attorney General of Washington
1125 Washington Street
P.O. Box 40100
Olympia, WA 98504-0100

QUESTION PRESENTED

Whether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the Takings Clause of the United States Constitution?

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INTEREST OF THE AMICI CURIAE

The States and their local governments bear primary responsibility for the Nation's land use planning and resource management efforts. This case calls into question the constitutionality of a vital planning tool: the short-term development moratorium. States and local governments use temporary moratoria to address urgent and serious planning problems, including environmental concerns, traffic hazards, and excess demand for basic services. Temporary moratoria can be a critical tool for effective planning, because moratoria preserve the status quo while citizens and lawmakers develop appropriate, reasoned responses to the problems associated with development.

A categorical rule that any temporary ban on development is a "taking," regardless of its purpose, duration, or effect on property values, would greatly reduce the ability of State and local governments to manage development in ways that protect the environment and public health, increase property values, and benefit the public as a whole. Such a rule would also impose significant financial burdens on State and local taxpayers, who may have to compensate property owners for minor delays and fluctuations in value caused by past and current moratoria. The amici States have a keen interest in defending the use of reasonable, short-term development moratoria as an element of the land use planning process.

INTRODUCTION AND SUMMARY OF ARGUMENT

Although petitioners and their amici seek to engage this Court in the tortured history of this litigation, the Court has chosen to address a single issue: whether a *temporary* moratorium on development is a categorical taking. This issue cannot be limited to the context of the Tahoe Basin and the restrictions placed on petitioners' property. In urban, suburban, and rural areas of the country, lawmakers from time to time find it necessary to impose temporary bans on development to address pressing problems of all kinds, from an overwhelmed sewer system to traffic congestion. Numerous state and federal courts have concluded that reasonable temporary moratoria are not takings. The amici States urge this Court to uphold the decisions of these courts and the Court of Appeals below, for two reasons.

First, temporary moratoria are an accepted and necessary part of the planning process, because they permit communities to respond to urgent problems and because they facilitate the planning process. The existing legal framework allows flexibility in the planning process while placing sufficient restrictions on the use of moratoria to protect the legitimate interests of property owners.

Second, a rule that any short-term ban on development is a *per se* taking would be a significant departure from this Court's precedents. By definition, a temporary ban on development involves neither a

physical intrusion nor a total deprivation of value. The Court's reasoning in cases such as *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), cannot easily be extended to apply to a temporary regulation that has only a minor impact on property values. Although petitioners place substantial reliance on *First English Evangelical Church v. County of Los Angeles*, 482 U.S. 304 (1987), that case addresses only the remedial issue of compensation for a regulatory taking. It does not support a rule that a moratorium designed to be temporary necessarily works a taking of property.

ARGUMENT

I. TEMPORARY MORATORIA ARE AN ACCEPTED AND CRITICAL ELEMENT OF THE LAND USE PLANNING PROCESS

A. State and local governments use temporary moratoria as a reasonable response to serious problems.

In a perfectly managed and predictable world, temporary moratoria would be unnecessary. Well-trained, fully funded professional planners would develop long-term plans that would fully anticipate every possible change a community might experience. Municipal services would never be stressed, traffic would remain forever manageable, open spaces would not be threatened, environmental problems would not develop. But we do not live in such a world. In this world, most land use planning is handled by local officials with little time and less money. Citizen boards make valiant efforts to develop long-term plans for their communities, but they are often hampered by lack of information and resources. And this world, most evidently, is not predictable. Change may come quickly, and local communities may be unprepared for the consequences. State and local governments need tools to respond to change while protecting important community interests, including property values.

A temporary moratorium – a short-term ban on development – is one such tool. Temporary moratoria "freeze" the status quo, preventing further harm while the community studies the problem and prepares a response. Communities have used moratoria

(sometimes called "interim" or "stop-gap" zoning) for decades, with the approval of state and federal courts. *See, e.g., Fowler v. Obier*, 7 S.W.2d 219 (Ky. 1928) (upholding emergency ordinance limiting issuance of building permits pending comprehensive zoning plan); *Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n*, 400 F. Supp. 1369 (D. Md. 1975) (upholding five-year moratoria on sewer connections). Both reported decisions of the lower courts and scholarly writings on the subject evidence a widely accepted view that, properly used, temporary moratoria are an appropriate response to serious concerns. *See, e.g.*, Norman Williams, Jr. & John H. Taylor, 1 *American Planning Law* §§ 30.01-.05 rev. 1988) (discussing issue and collecting cases); Kenneth H. Young, 1 *Anderson's American Law of Zoning* § 5.24 (1996 ed.) (same); Patrick J. Rohan, 3 *Zoning & Land Use Controls* §§ 22.01-22.04[2] (Eric Damian Kelly ed., rev. 2001) (same).

Perhaps the most common reason for a temporary moratorium is an unexpected surge in development or change in development patterns that prompts a community to reexamine its planning efforts. *See, e.g., Almquist v. Town of Marshan*, 245 N.W.2d 819, 825-26 (Minn. 1976) (upholding six-month moratorium where small-town board "was confronted with four developers proposing plans which would have a profound effect on economic, esthetic, and engineering problems for many years to come"). Development may threaten the traditional rural character of an area, as farms and open space disappear. *See id.* at 827-28 (following moratorium, town adopted zoning for agricultural preservation); *Zilber v. Town of Moraga*, 692 F. Supp.

1195, 1206-07 (N.D. Cal. 1988) (upholding town's one and a half year moratorium, pending open space study). Commercial growth may also pose new challenges for an urban area, as, for example, when incompatible uses encroach upon a historical district. *See Schafer v. City of New Orleans*, 743 F.2d 1086, 1088, 1090 (5th Cir. 1984) (upholding city moratorium on fast-food development in "picturesque" and "historically important" neighborhood); *see also Williams v. City of Central*, 907 P.2d 701, 705-06 (Col. Ct. App. 1995) (approving city's ten-month moratorium on development in gambling district, pending study on city's ability to absorb growth spawned by legal gambling). Faced with development pressures, communities have traditionally used interim controls, including moratoria, to "inhibit or prevent new growth while an area is being studied" for initial or revised zoning. Rohan, 3 *Zoning & Land Use Controls* § 22.01[1], at 22-5.

Rapid development may also outpace available municipal services. *See id.* § 22.01[2], at 22-8 (communities may temporarily deny development where public services are overloaded). Temporary bans on new sewer connections have been justified by pressing public health concerns, as growing populations overwhelmed existing systems. *See, e.g., Smoke Rise,* 400 F. Supp. at 1373, 1383 (upholding sewer moratoria based on inadequate facilities and discharges of untreated sewage into waterways); *Brazos Land, Inc. v. Board of County Comm'rs*, 848 P.2d 1095, 1096, 1101 (N.M. Ct. App. 1993) (upholding nine-month moratorium on subdivision approvals designed in part to allow time to promulgate more

stringent waste disposal requirements). Potential water shortages have prompted temporary development moratoria. *See Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1237 (9th Cir. 1994) (approving one-year moratorium in light of drought conditions and estimates of city water shortages if additional development was approved). And, aside from immediate public health concerns, the demand for city services and new infrastructure may expand faster than the tax base, resulting in budget and tax problems that require additional time for resolution.

Along with overwhelming municipal services, rapid development may overwhelm the local highway system. Towns and cities have to cope with frustrating delays and possibly dangerous conditions caused by traffic congestion – conditions that will only worsen if development continues before road improvements are possible. Not surprisingly, some cities have used temporary moratoria to gain sufficient time to address traffic problems. *See, e.g., Woodbury Place Partners v. City of Woodbury*, 492 N.W.2d 258 (Minn. 1992) (holding that city's two-year moratoria on development near highway interchange, pending traffic study, was not a categorical taking).

Other public health and safety concerns provide additional bases for interim bans on development. For example, in a case that this Court already knows, the County of Los Angeles adopted an interim ban on development in a flood plain following a devastating, lethal flood. *First English Evangelical Lutheran Church v. County of Los Angeles*, 258 Cal. Rptr. 893, 895 (Cal. Ct. App. 1989). On remand from this Court, the California appellate court concluded in part that

the ordinance was a reasonable temporary measure that permitted the county to "conduct an extensive study" to determine "what, if any, structures and uses would be compatible with the preservation of life and health of future occupants." *Id.* at 906. A New Jersey court similarly approved a moratorium on development in a flood plain pending construction of a flood-control project. *Cappture Realty Corp. v. Board of Adjustment*, 336 A.2d 30 (N.J. Super. Ct. App. Div. 1975).

Finally, serious environmental concerns such as those facing Lake Tahoe may justify temporary limits on development. No one disputes that Lake Tahoe was at substantial risk of irreparable harm from continued uncontrolled development. The situation was sufficiently serious that Congress in 1980 approved amendments to the Tahoe Regional Planning Compact that directed the Tahoe Regional Planning Agency to establish environmental threshold carrying capacities and to develop a new regional plan. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 216 F.3d 764, 766-68 (9th Cir. 2000). Environmental harm can be difficult or impossible to remedy, and it is not unreasonable for a planning agency to put a temporary halt to damaging development while studying the problem and looking for a solution. *See* Rohan, 3 *Zoning & Land Use Controls* § 22.01[1], at 22-5 (interim controls may be used to protect "areas perceived to be environmentally sensitive").

What these cases from across the country show is that local communities are struggling with serious problems caused by development, and that temporary moratoria are one step communities can take to

prevent significant harm. The cases do not reveal a pattern of governmental abuse, but of responsible behavior: a new problem prompts a short moratorium, the problem is studied, zoning ordinances or other regulations are changed, and the moratorium is lifted. *See, e.g., Zilber*, 692 F. Supp. at 1197 (moratorium expired after one and a half years; town studied zoning for ridge and hillside open space and enacted new ordinance); *Williams v. City of Central*, 907 P.2d at 703 (moratorium repealed after ten months, when growth studies completed); *Almquist,* 245 N.W.2d at 822, 825 (moratorium lasted seven months; town consulted with professional planners and developed comprehensive zoning ordinance); *Woodbury Place Partners*, 492 N.W.2d at 260 (moratorium expired after two years; city enacted moratorium in part to prohibit construction that would adversely affect road design and public health and safety). Without question, temporary development moratoria have an established and important role in the dynamic process of land use planning.[1]

---

[1] As set forth in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978), a court reviewing a regulatory takings claim must consider, among other factors, the "extent to which the regulation has interfered with distinct investment-backed expectations." An existing regulatory regime "helps to shape the reasonableness of those expectations." *Palazollo v. Rhode Island*, 121 S. Ct. 2448, 2466 (2001) (O'Connor, J., concurring). The common use of temporary moratoria in a jurisdiction thus may bear on whether a property owner can show that a short-term ban on development interfered with her reasonable expectations. *See id.* at 2467 (noting the relevance of the "regulatory backdrop" to a takings inquiry).

B. Temporary moratoria protect and improve the planning process.

The "commendable task of land use planning," *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994), requires, at a minimum, careful study and citizen involvement. *See generally* Robert H. Freilich, *Interim Development Controls: Essential Tools for Implementing Flexible Planning and Zoning*, 49 J. Urban Law 65 (1971) (stressing need for intelligent planning process, including debate and citizen participation). Temporary moratoria are a critical element in the planning process, because they provide time for the process to work. They do so in at least two ways: by preventing a "race" to development when property owners learn that land use restrictions may be changed and by preventing a problem from getting significantly worse before it can be addressed.

Courts have long recognized that temporary moratoria protect a community's long-term development goals by preventing a race to development. In 1925, the Supreme Court of California upheld an emergency ban on building multifamily housing, noting that a comprehensive zoning plan "will take much time to work out" and that it would be "destructive of the plan" to permit certain construction "during the period of [the plan's] incubation." *Miller v. Board of Public Works*, 234 P. 381, 388 (Cal. 1925). Property owners who know that land use restrictions may be changed have an incentive to accelerate the pace of development, and that development in turn may

thwart the goals of the planning process. *See, e.g.*, Freilich, 49 J. Urban L. at 78-79 (zoning effort may prove futile as developers rush to build nonconcorming uses); Rohan, 3 *Zoning and Land Use Controls* § 22.01[1] ("[d]evelopers race to beat the imposition of new controls").

Without temporary moratoria as an option, local officials face a difficult choice. Public participation and investment in the planning process is both critical to its success and fundamental to our democratic society. *See, e.g.*, Young, 1 *Anderson's American Law of Zoning* § 5.24 ("validity of the plan and the success of its implementation depend in large measure on criticism, advice, and support [which in turn rest] upon wide public understanding"). But public dissemination of planning goals and potential zoning changes may prompt a race to develop that will have an adverse effect on the community's long-term interests. As a result, planning officials may feel pressure to limit the opportunity for public comment, to protect the overall goals of the planning process. Temporary moratoria provide a safety valve in this situation, by preventing inappropriate development while the community has a full democratic debate over its future.

The second reason temporary moratoria serve a critical purpose is the simple truth that problems worsen over time, and solutions become more difficult and more expensive. Lake Tahoe itself teaches this lesson. If we had known in the 1950s what we know now about Lake Tahoe, the affected communities would have been able to control and plan development to avert eutrophication of the lake. The same principle governs other problems. As traffic congestion increases,

so do the delays and disruption caused by roadwork and expansion projects. Coping with contamination of waterways from raw sewage is more expensive than halting development while sewer capacity is increased.

Temporary moratoria may allow time not only for simpler, less expensive solutions but also for creative approaches to problems caused by development. When a problem first begins to emerge, a community may have various options to address it. For example, a community concerned about vanishing open space might consider a package of zoning changes, tax credits, and grants from outside sources to purchase critical empty land. *See generally* JoAnne L. Dunec, *Economic Incentives: Alternatives for the New Millenium*, 12 Natural Resources & Env. 292 (Spring 1998) (discussing options to traditional regulatory approach for resolving environmental and land use challenges). A community facing rapid development, however, may see those options vanish before it can act. It may be too late to save a farm by purchasing its development rights, or to preserve the historical character of an old neighborhood by attracting the interest of the right nonprofit group. A temporary moratorium may make such creative solutions – solutions that satisfy individual property owners and the community – possible.

C. Temporary moratoria are already subject to reasonable limitations that protect property owners.

Although temporary moratoria have long been a part of the land use planning process, planning officials have not had free reign to impose unreasonable or

unjustified moratoria. Both the lower courts and state legislatures have placed reasonable limits on temporary moratoria that serve to protect the interests of property owners. *See generally* Rohan, 3 *Zoning and Land Use Controls* §§ 22.02, 22.03 (discussing validity and constitutionality of temporary moratoria).

An obvious limit is that temporary moratoria must, in fact, be temporary. Going beyond constitutional requirements, several states place specific statutory limits on the length of development moratoria. *See, e.g.*, Colo. Rev. Stat. § 30-28-121 (2001) (moratoria not to exceed six months); Mont. Code Ann. § 76-2-306 (six months plus one to two year extension) (2001); Or. Rev. Stat. § 197.520 (1999) (120 days plus six-month extension). In the absence of a statutory limit, courts have generally reasoned that a "suspension or limitation [on development] may be imposed only for a reasonable time." Young, 1 *Anderson's American Law of Zoning* § 5.24, at 449. For example, the Wyoming Supreme Court, while recognizing that an interim freeze may be valid, also warned that municipalities could not "act so lethargically as to effectively confiscate private property." *Schoeller v. Board of County Comm'rs*, 568 P.2d 869 (Wyo. 1977). Other courts have not hesitated to invalidate a moratorium of unreasonable duration. *See Lakeview Apartments v. Town of Stanford*, 485 N.Y.S.2d 801 (N.Y. App. Div. 1985).

What is reasonable, of course, depends upon the context. As the Supreme Court of New Jersey has recognized, there is no "inflexible rule" but "[e]ach situation must be assayed in its own particular factual setting." *Schiavone Constr. Co. v. Hackensack*

Meadowlands Dev. Comm'n, 486 A.2d 330, 331 (N.J. 1985) (quoting *Deal Gardens v. Loch Arbour*, 226 A.2d 607 (N.J. 1967)). One relevant factor may be the "time required to reach and implement a final decision as to the ultimate use of the property." *Id.* at 333. In any event, the inquiry is fact-specific. *See id.* (remanding for further factual development where temporary moratorium lasted significantly longer than the lower court had predicted).

Courts have also considered the purpose of a moratorium, and whether planning officials are acting in good faith. *See, e.g., Smoke Rise*, 400 F. Supp. at 1384 ("it is important to examine whether the sewer moratoria orders have been implemented for the primary purpose of achieving other objectives which are not permissible"); Rohan, 3 *Zoning & Land Use Controls* § 22.039[3], at 22-49 (interim controls may be deemed takings if the justification is inadequate or if the municipality takes no steps to cure the problem it faces). A Rhode Island district court invalidated a building moratorium after finding that the Town had not "acted reasonably and in good faith" to alleviate the sewer problems that prompted the ban. *Q.C. Constr. Co. v. Gallo*, 649 F. Supp. 1331, 1338 (D. R.I. 1986). The court acknowledged that a moratorium may be constitutional in some circumstances, but noted that in this case, the moratorium was not part of a plan to remedy the Town's sewer problems and was not time-limited. *Id.* at 1337-38. In another sewer case, New York's high court held that a town could not impose a moratorium on multifamily units based on the town's own failure to address a longstanding pollution problem. *Westwood Forest Estates v. Village of South Nyack*, 244 N.E.2d 700, 702-03 (N.Y. 1969). The court acknowledged that a reasonable, limited moratorium on building permits might be appropriate, but found that the town acted inappropriately in these circumstances. *Id.*

These cases show that the existing legal framework, including existing takings law and the basic due process requirement of reasonableness, provides sufficient restrictions on the use of temporary moratoria. One scholar summarizing the law governing moratoria states that municipalities are obligated to "maintain [a] freeze for only so long as necessary and to expeditiously plan and put into effect a permanent scheme. If a municipality fails to do that, an ordinance may be declared unconstitutional on substantive due process grounds or as a taking." Rohan, 3 *Zoning & Land Use Controls* § 22.03[2], at 22-41. Most planning authorities adhere to this standard; where they fail to do so, the aggrieved property owners have resort to the courts for a remedy. As long as this is the case, there is no need for a categorical rule treating all temporary moratoria as *per se* takings – a rule that would eliminate a critical planning tool and jeopardize the planning process in many communities.

II. THIS COURT'S PRECEDENTS DO NOT SUPPORT A CATEGORICAL TAKINGS RULE FOR TEMPORARY MORATORIA

Just last term, this Court reaffirmed that regulatory takings claims are generally analyzed under

the balancing test set forth in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). *See Palazzolo v. Rhode Island*, 121 S. Ct. 2448, 2457, 2464-65 (2001) (where property owner failed to establish a deprivation of all economic value, his claim should properly be examined under *Penn Central*); *id.* at 2466 (O'Connor, J., concurring) ("our polestar . . . remains the principles set forth in *Penn Central* itself"). Petitioners, however, reject the established *Penn Central* test and instead seek a brand-new categorical rule that deems any short-term prohibition on development a *per se* taking – regardless of the regulation's purpose, duration, or effect on property values.[2]

In support of this argument, petitioners and their amici attempt to draw on the two narrow circumstances in which the Court has recognized a categorical taking: where a regulation "compel[s] the property owner to suffer a physical 'invasion' of his

[2] Because of the strategic choices they made below, petitioners can no longer assert a takings claim under *Penn Central*. At trial, they made a "calculated choice" to focus on the categorical takings argument, and did not introduce specific evidence of economic impact that would have been relevant to a *Penn Central* claim. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 34 F. Supp. 2d 1226, 1241 (D. Nev. 1999). They did not appeal the district court's ruling that there was no taking under *Penn Central*. *See Tahoe-Sierra Preservation Council*, 216 F.3d at 773 ("the plaintiffs have stated explicitly on this appeal that they do not argue that the regulations constitute a taking under the ad hoc balancing approach described in *Penn Central*"). In light of this procedural background, petitioners properly did not raise a *Penn Central* claim in their petition for certiorari or their opening brief.

property," or where a regulation "denies all economically beneficial or productive use of land." *Lucas*, 505 U.S. at 1015. They also suggest that the Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) requires a holding that any development moratorium is a *per se* taking.

Petitioners' reasoning is flawed, however. First, they blur the analytical lines separating physical and regulatory takings. Second, they misconstrue this Court's reasoning in *Lucas*, a decision that in no way supports a categorical takings rule for temporary moratoria. And finally, they ignore the limited reach of the Court's holding in *First English*.

A. Petitioners fail to understand the sharp distinction between physical and regulatory takings.

By pressing their case for a categorical rule, petitioners seek to distract this Court from two critical issues: first, that temporary moratoria serve reasonable and important public purposes, and second, that temporary moratoria often have a minimal impact on property values. Both of these issues are fundamental to any regulatory takings claim. *See Penn Central*, 438 U.S. at 124-25. Rejecting *Penn Central*, however, petitioners instead draw substantially on the reasoning of cases involving physical invasions of private property. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (regulation requiring landlords to accept installation of cable wires on buildings constituted a

"permanent physical occupation"); *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979) ("imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina"). In so doing, they ignore the critical distinctions between physical and regulatory takings.

The Court's decision in *Loretto*, in particular, makes clear that, for purposes of the Takings Clause, a physical invasion or occupation is entirely distinct from other types of land use regulations. "[W]e have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause." *Loretto*, 458 U.S. at 426. The Court's reasoning in *Loretto* is wholly focused on the "unique" context of a physical occupation of property, "where the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation." *Id.* at 432, 441. The Court emphasized not the potential economic injury to the property owner but the "special kind of injury [suffered] when a *stranger* directly invades and occupies the owner's property." *Id.* at 436. This reasoning shows unequivocally that the labels applied in a takings case do have constitutional significance. *Cf.* Pet. Br. 15. Physical takings are different, and the principles that govern them do not apply to ordinary regulatory takings.

Petitioners cite *Loretto* and *Kaiser* in part for the proposition that good intentions on the part of the government do not affect the requirement of just compensation. Pet. Br. 39-40. To a point, this statement is unobjectionable. If a government action is

found to work a taking, compensation is constitutionally required, regardless of the government's purpose. But the real issue in this case is not whether compensation is required for a temporary moratorium, but whether a temporary moratorium works a taking. And on that key question, *Penn Central* teaches that the "character of the governmental action" is a relevant factor. *Penn Central*, 438 U.S. at 124. A regulation that "adjust[s] the benefits and burdens of economic life to promote the common good" is not readily deemed a taking. *Id.*; *see also Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986). Thus, the public interest is always relevant to a regulatory takings claim. *See Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980) (the question whether property has been "taken" in the constitutional sense "necessarily requires a weighing of public and private interests"); *see also Palazzolo*, 121 S. Ct. at 2466 ("The purposes served, as well as the effects produced, by a particular regulation inform the takings analysis.") (O'Connor, J., concurring); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987) ("[T]he character of the governmental action involved here leans heavily against finding a taking; the Commonwealth of Pennsylvania has acted to arrest what it perceives to be a significant threat to the common welfare.").

The Court in *Loretto* clarified and explained its special treatment of physical takings. *See* 458 U.S. at 434-35 ("[O]ur cases uniformly have found a taking to the extent of the [physical] occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the

owner.") But the Court also carefully distinguished its "very narrow" holding regarding physical invasions from the "substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's *use* of his property." *Id.* at 441. When challenged as takings, such ordinary restrictions on use are evaluated under *Penn Central's* balancing test, which weighs the "economic impact of the regulation" and the "character of the governmental action." *Penn Central*, 438 U.S. at 124; *Loretto*, 458 U.S. at 426. *Loretto* and other physical takings cases provide no support for a rule that a temporary ban on development is a *per se* taking.

B. The Court's narrow decision in *Lucas* does not apply to a regulatory takings claim based on a temporary development moratorium.

Setting aside physical intrusions, the only other precedent for a categorical takings rule is this Court's decision in *Lucas*. But *Lucas* was premised on an "extraordinary" and "rare" circumstance, where direct government regulation had rendered private property "valueless." *Lucas*, at 1017-18, 1020. Although petitioners rely in part on *Lucas*, the opinion does not support their position. In fact, the Court's reasoning in *Lucas* undermines the argument that the Court should create a categorical takings rule for temporary development moratoria.

The Court in *Lucas* set out several reasons for its rule that a regulation that deprives an owner of *all* economically beneficial or productive use of land is a

per se taking. First, when the government imposes such a drastic limitation on land use, "it is less realistic to indulge our usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life' in a manner that secures an 'average reciprocity of advantage' to everyone concerned." *Id.* at 1017-18 (citations omitted) (quoting *Penn Central*, 438 U.S. at 124, and *Pennsylvania Coal*, 260 U.S. at 415). Second, the practical concern – that the government could not function if it had to pay for every change in the law that affected property values – does not apply to the "relatively rare" circumstance where a property owner is deprived of "all economically beneficial uses." *Id.* at 1018. And finally, "regulations that leave the owner of land without economically beneficial or productive options for its use . . . carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." *Id.*

Taken together, these three concerns led the Court to conclude that a landowner suffers a taking where he is "called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle." *Id.* at 1019. None of these concerns, however, supports the conclusion that a temporary development moratorium is a *per se* taking.

First, temporary moratoria, like other ordinary land use regulations, do provide reciprocal benefits to property owners. Moratoria aid the planning process – and good municipal planning, in turn, increases property values and improves the quality of life.

Although a given property owner may suffer some economic harm due to a short-term ban on development, that property owner will eventually benefit from well-designed traffic patterns, functioning municipal services, and attractive, environmentally sound development. *Cf. Agins*, 447 U.S. at 262 ("zoning ordinances benefit the [property owners] as well as the public by serving the city's interest in assuring careful and orderly development of residential property with provision for open-space areas"); *Penn Central*, 438 U.S. at 134-35 (New York City's landmark preservation law benefits all New York citizens, including owners of Grand Central Terminal, "both economically and by improving the quality of life in the city"). The property owner will also benefit from the opportunity for public participation. "[T]hough landowners may chafe at the severity of a temporary limitation on use, they benefit by receiving a greater opportunity to challenge the possible imposition of permanent restrictive measures." Rohan, 3 *Zoning & Land Use Controls* § 22.01[1], at 22-5.

Second, a decision that every temporary moratorium is a taking would have a significant practical impact on land use planning. Land use is a "constantly evolving and continuously changing phenomenon." Freilich, 49 J. Urban L. at 65. Governments and citizens need time to respond to urgent or unexpected problems. Short-term moratoria provide needed breathing space and permit government officials to do their jobs properly instead of making snap decisions about complicated problems. In this way, short-term moratoria are entirely different in

kind from the permanent ban on development at issue in *Lucas*.

Third, short-term moratoria do not pose the risk that the government is in fact attempting to use private property to serve a public purpose, without paying the required charge. A six-month or one or two year ban on development does not transform private property into a nature preserve or a protected viewshed. *Cf. Lucas*, 505 U.S. at 1018-19 (suggesting that regulations that require land to be left in its natural state are the equivalent of scenic or conservation easements). Indeed, the property at issue may soon be used for a shopping mall or a residential subdivision. In the context of a typical short-term moratorium, the public gains no specific benefit or use from the affected property, but only the common benefit of sufficient time for study and planning purposes.

The driving concern underlying the Court's takings jurisprudence is fairness. The purpose of the Takings Clause "is to prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Palazzolo v. Rhode Island*, 121 S. Ct. 2448, 2457-58 (2001). In *Lucas*, the Court acknowledged that where the government deprives a property owner of all economic value, fairness demands compensation. But the Court has also recognized that it is fair – in fact, it is a necessary part of life in an organized society – to expect property owners to absorb fluctuations in value caused by government actions. *See Agins*, 447 U.S. at 263 n.9 ("Mere fluctuations in

value during the process of government decision-making, absent extraordinary delay, are incidents of ownership. They cannot be considered as a taking in the constitutional sense.") (internal quotation marks omitted). Far from being categorically unfair, temporary moratoria generally serve important public goals that benefit all citizens, including affected property owners, and they do so without drastically affecting property values.

C. *First English* does not require a holding that any temporary moratorium is a *per se* taking.

Perhaps recognizing that a temporary moratorium on use is akin to neither a physical intrusion nor a total deprivation of value, petitioners also attempt to rely on this Court's decision in *First English*. In so doing, however, they significantly distort the holding of the case. The Court in *First English* quite specifically addressed the "remedial question" of appropriate compensation for a taking. 482 U.S. at 311. After several attempts, the Court finally reached, and reversed, California's longstanding rule that money damages were not available as compensation for a regulatory taking. *See id.* at 310-11 (noting that the Court had been unable to reach the remedial question in several earlier cases). But the Court carefully limited its holding to the issue of remedy: "[w]e merely hold that *where the government's activities have already worked a taking of all use of property*, no subsequent action by the government can relieve it of the duty to provide compensation for the

period during which the taking was effective." *Id.* at 321 (emphasis added).

Thus, although petitioners emphasize that the ordinance at issue in *First English* was a temporary moratorium, that fact is entirely irrelevant to the Court's holding. The Court did not consider whether the challenged ordinance had in fact worked a taking of property; indeed, the Court expressly refused the County's suggestion that it decide the takings claim on the merits. *See id.* at 313 ("We accordingly have no occasion to decide whether the ordinance at issue actually denied appellant all use of its property."). Although petitioners seek to examine *First English* "in the context" of the underlying claim, Pet. Br. 32, the Court itself made clear that the underlying allegations did not bear on the Court's holding.

First English establishes that a regulatory taking may be "temporary," in that the government may rescind a regulation *after* it has worked a taking of property. 482 U.S. at 310 (describing a temporary regulatory taking as a regulatory taking that is "ultimately invalidated by the courts"). But *First English* does not decide the question presented in this case: whether a moratorium designed to be temporary *necessarily* works a taking. Petitioners obscure this critical distinction by focusing on the facts, rather than the holding, of *First English*.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

WILLIAM H. SORRELL
Attorney General of Vermont
* BRIDGET C. ASAY
Assistant Attorney General
109 State Street
Montpelier, Vermont 05609
(802) 828-3181
Counsel for Amici States

* *Counsel of Record*

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In The

Supreme Court of the United States

TAHOE SIERRA PRESERVATION COUNCIL, INC., *et al.*,

Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMERICAN PLANNING ASSOCIATION AND THE NATIONAL TRUST FOR HISTORIC PRESERVATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

ROBERT H. FREILICH*
E. TYSON SMITH
JASON M. DIVELBISS
FREILICH, LEITNER & CARLISLE
4435 Main Street
Kansas City, MO 64111
(816) 561-4414

Counsel of Record for Amici Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the Takings Clause of the United States Constitution?

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INTEREST OF *AMICI CURIAE*[1]

Amicus American Planning Association ("APA") represents the nation's land use planning professionals – those charged with addressing the public's interest in how land is used and with drafting regulations to ensure that the impacts of adverse land use are minimized. As a nonprofit, educational research organization with more than 30,000 members nationwide, the APA is the oldest and largest organization devoted to advancing state and local land use planning.

The APA has forty-six chapters representing all fifty states, including chapters in California and Nevada. Members of the APA are routinely involved in comprehensive land use planning and its implementation through land use regulation. An overriding concern of the APA is that in order for comprehensive land use planning to foster orderly and beneficial development, communities must have the tools and legal authority to deal effectively with a variety of types of land uses.

The APA has participated as amicus in a number of cases before this Court; most recently in *City of Los Angeles v. Alameda Books, Inc. and Highland Books, Inc.* (No. 00-799) in support of the City of Los Angeles; in *Lorillard Tobacco Co., et al., v. Thomas F. Reilly, Attorney General of Massachusetts* (No. 00-596, 00-597) in support of Massachusetts; and in *Anthony Palazzolo v. Rhode Island* (No. 99-2047) in support of Rhode Island.

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[1] Pursuant to Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

Amicus National Trust for Historic Preservation ("National Trust") was chartered by Congress in 1949 as a private charitable, educational, and nonprofit organization to "facilitate public participation in the preservation of sites, buildings, and objects significant in American history and culture." 16 U.S.C. §§ 461, 468. The National Trust's mission is to foster an appreciation of the diverse character and meaning of our American cultural heritage and to preserve and revitalize the livability of our communities by leading the nation in saving America's historic environments. The National Trust has more than 250,000 members nationwide.

The National Trust's expertise on historic preservation law is nationally recognized. The National Trust has participated as amicus curiae in many cases involving the enforcement and interpretation of state and local historic preservation laws, including cases raising constitutional takings challenges to land use regulation and preservation ordinances. *See, e.g., Palazzolo v. Rhode Island*, 121 S. Ct. 2448 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 119 S. Ct. 1624 (1999); *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659 (1997); *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992); *Yee v. City of Escondido*, 112 S. Ct. 1522 (1992); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); and *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

STATEMENT OF THE CASE

Amici adopt the statement of the case as set forth by Respondents. However, the following points are of particular significance to the matters set forth in this brief.

The Tahoe Regional Planning Agency (TRPA) adopted Ordinance 81-5, prohibiting development in environmentally sensitive areas from August 1981 through August 1983, in order to carry out studies, adopt carrying capacities, and adopt the regional plan required by the Amended Tahoe Regional Compact, Pub. L. No. 96-551, 94 Stat. 233 (1988) (authorizing a thirty-month moratorium). When it became apparent that final adoption of the new plan required additional time, TRPA adopted Resolution 83-21, extending the two-year moratorium for an additional eight months to April 1984, or a total of thirty-two months – only two months longer than the statutory authorization.

On appeal to the Ninth Circuit, the principal question was "whether a temporary planning moratorium, enacted by TRPA to halt development while a new regional land use plan was being devised, effected [*a facial*] taking of each plaintiff's property under the standard set forth in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992)." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 766 (9th Cir. 2000). Recognizing its critical importance to their taking claim, the Preservation Council petitioned the Ninth Circuit to accept the "conceptual severance" argument when determining the relevant property interest allegedly taken. The Council argued that the property interest to be considered is not the entire fee simple in the property, but rather the "temporal 'slice' of each fee that covers the time span during which Ordinance 81-5 and Resolution 83-21 were in effect." *Id.* at 774.

Recognizing the inconsistency of Petitioners' argument with this Court's well-established precedent, the Ninth Circuit explained:

> Property interests may have many different dimensions. For example, the dimensions of a

> property interest may include a physical dimension (which describes the size and shape of the property in question), a functional dimension (which describes the extent to which an owner may use or dispose of the property in question), and a temporal dimension (which describes the duration of the property interest).

Id. Citing *Penn Central*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978) (rejecting "airspace" as spatial severance); and *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987) (rejection of "spatial" conceptual severance); *Andrus v. Allard*, 444 U.S. 51, 100 S. Ct. 318, 62 L. Ed. 2d 210 (1979) (rejection of "functional" severance); *Agins v. City of Tiburon*, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980) (rejection of "temporal" severance), the Ninth Circuit held: "It would make little sense to accept temporal severance and reject spatial or functional severance." *Tahoe-Sierra*, 216 F.3d at 772-74.

> To not reject the concept of temporal severance, we would risk converting every temporary planning moratorium into a categorical taking. Such a result would run contrary to the Court's explanation that it is 'relatively rare' that government 'regulation denies all economically beneficial or productive use of land.' *Lucas*, 505 U.S. at 1015. . . . [T]he relevant property interests in the present case are the whole parcels of property that the plaintiffs own.

Id. at 777. The court also held that "given the importance and long-standing use of temporary moratoria, courts should be exceedingly reluctant to adopt rulings that would threaten the survival of this crucial planning mechanism." *Id.* The court concluded that the temporary moratorium adopted by TRPA did not deny all use or value of the property. "Given that the ordinance and resolution banned development for only a limited period,

these regulations preserved the bulk of the future developmental use of the property. This future use had a substantial present value." *Id.* at 781. "This economic reality is precisely what differentiates a permanent ban on development, even if subsequently invalidated, from a temporary one." *Id.* at 781 n.26.

Finally, this case comes to the Court in a posture of a facial taking. As the Court held in *Keystone*, 480 U.S. 470:

> Because appellees' taking claim arose in the context of a facial challenge . . . the only issue properly before . . . this Court, is whether the 'mere enactment' of the Surface Mining Act effected a taking . . . petitioners thus face a uphill battle . . . because petitioners have not claimed, at this stage, that the Act makes it commercially impracticable for them to [make a profit].

Id. at 494-95.

See also, Yee v. City of Escondido, 503 U.S. 519, 533-34, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992) (citing *Keystone*). In sum, the Ninth Circuit found that even apart from the Petitioners' assertion of a "temporal severance" theory, the "facial" taking argument of Petitioners must fail because sufficient evidence was presented to show that the property had use and value during the moratorium so as to require an as-applied, *ad hoc* factual determination under *Penn Central*, and Petitioners had waived all as-applied takings claims.[2]

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[2] The Ninth Circuit did not consider whether the development moratorium effected a compensable taking under *Penn Central*, 438 U.S. 104 (1978). The court explained: "[T]he only question before us is whether the rule set forth in *Lucas* applies – that is, whether a categorical taking occurred because Ordinance 81-5 and Resolution 83-21 denied the plaintiffs 'all economically beneficial or productive use of land.' " *Tahoe-*

SUMMARY OF ARGUMENT

1. Temporary moratoria are fundamental to the planning process and have been traditionally recognized by the courts and authorized by state statutes as background principles of state law. Petitioners concede in their opening brief that "planning" or "time out" moratoria are validly used by planning agencies to provide "breathing space" and contend only that the "dubbed" temporary moratorium in this case was, in fact, a permanent substantive change in the regulations. (Petitioners' Brief at 4-5.) Petitioners' facial taking claim must fail because it expressly recognizes that temporary moratoria do not constitute a taking, the very question certified by this Court; or in the alternative, the grant of *certiorari* should be dismissed as "improvidently granted."
2. Temporary moratoria constitute a "normal delay" in the planning process, and cannot constitute a facial partial or temporary taking.
3. Both *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987) and *Lucas* support the Ninth Circuit's holding that temporary moratoria do not effect a taking. *First English* limited temporary takings to invalidated permanent restrictions lasting for a temporary period of time – specifically, that once a taking has been found, the period between the time of

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Sierra, 216 F.3d at 773. The TRPA only appealed the District Court's finding of a categorical taking under *Lucas* and the Tahoe-Sierra Preservation Council did not appeal the court's finding of no compensable taking under *Penn Central*. "And even if arguments regarding the *Penn Central* test were fairly encompassed by the defendants' appeal, the Petitioners have stated explicitly on this appeal that they do not argue that the regulations constitute a taking under the ad hoc balancing approach described in *Penn Central*." *Id.*

the taking and the eventual invalidation and rescission of the offending regulation would be a temporary taking. *First English*, 482 U.S. at 321. *Lucas* is clearly limited to those relatively rare circumstances where all economically viable use and all value is *permanently* removed due to the regulatory impact of the challenged regulation. *Lucas*, 505 U.S. at 1015, *see also Palazzolo v. Rhode Island*, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001).

4. Apart from "normal delays," takings analysis requires consideration of the entirety of the property, including temporal, as well as spatial and use elements, *Penn Central*, 438 U.S. at 130, *Keystone*, 480 U.S. 470 (1987). The Ninth Circuit properly found that, contrary to the arguments asserted by Petitioners, the takings analysis looks at all components of the fee, *Tahoe-Sierra*, 216 F.3d at 774-79. Furthermore, reviewing courts should not conceptually sever these interests "into small temporal pieces" any more than they would sever spatial interests (*e.g.*, setbacks) or allowable uses (*e.g.*, traditional zoning restrictions). *Id.* Rather, courts in a facial taking claim should look at all elements to determine whether, in totality, "all economically viable use" has been permanently removed from the property. *Id.*, *see also Lucas*, 505 U.S. at 1012.

ARGUMENT

I. MORATORIA, REASONABLE IN DURATION, MEANS, AND ENDS, ARE FUNDAMENTAL TO ACHIEVING PROPER PLANNING AND LAND USE REGULATION IN THE UNITED STATES

Interim development controls and moratoria are fundamental to a rational, defensible planning process. Prior to *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926), courts had recognized the necessity of temporary moratoria of building permit issuance

pending planning studies as a prerequisite to a valid planning and regulatory process. *Miller v. Bd. of Public Works*, 234 P. 381, 195 Cal. 477 (Cal. 1925), *cert. den.*, 273 U.S. 781 (1926).[3] Courts since that time have recognized that a temporary halt on development activity during a period of study is not only reasonable, but also ensures that government acts in a manner that is thoughtful and deliberate, not arbitrary and capricious. *Williams v. City of Central*, 907 P.2d 701, 706 (Colo. Ct. App. 1995). Regulatory agencies across the country have used temporary moratoria and interim development controls as a legitimate means of creating breathing space while necessary background data could be gathered, analyses conducted,

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[3] The significance of planning to zoning regulation was fully recognized when the U.S. Department of Commerce issued the Standard State Zoning and Planning Enabling Acts in 1926 and 1928, respectively, including the requirement that "Zoning be in accordance with a comprehensive plan." Professor Charles Haar has stated that one of the important aspects of planning was to assure that property owners be protected by meaningful standards. "With the heavy presumption of constitutional validity that attaches to legislation . . . and the difficulty in judicially applying a 'reasonableness standard,' there is danger that zoning [would] tyrannize individual property owners." Charles Haar, *In Accordance With a Comprehensive Plan*, 68 Harv. L. Rev. 1154-58 (1955).

As the New York Court of Appeals stated in *Udell v. Haas*, 235 N.E.2d 897, 901, 21 N.Y.2d 463, 288 N.Y.S.2d 888 (1968): " . . . the comprehensive plan is the essence of zoning. Without it there can be no rational allocation of land use. It is the insurance that the public welfare is served and that zoning does not become nothing more than a Gallup poll." *See also* Daniel Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 Mich. L. Rev. 799 (1976); and *Geo-Tech Reclamation Indus. v. Hamrick*, 886 F.2d 662 (4th Cir. 1989) (land use regulation requires comprehensive planning to avoid "mob rule").

and policies assessed. Patrick J. Rohan, Zoning and Land Use Controls, §22.01[1] (1998).

The reasonableness of a moratorium is measured by both the length of its duration and its relation to the underlying studies supporting change in the regulations. Thus, an enacting authority must diligently pursue completion of the planning process, including studies, analyses, public participation, and the drafting of legislation. *Id.* at §22.02[2]. The need for the moratorium is justified by the need to pursue further study of the matter at hand. *Williams*, 907 P.2d at 705. If, however, having established a legitimate need, the government fails to pursue the necessary studies or to work diligently toward resolution of the matter, the substantive validity of the moratorium can be called into question. *Id. c.f. Almquist v. Town of Marshan*, 245 N.W.2d 819, 826, 308 Minn. 52 (Minn. 1976); and *State ex rel. SCA Chemical Waste Serv., Inc. v. Konigsberg*, 636 S.W.2d 430, 434 (Tenn. 1982).

Moratoria have been set aside when the restraint has been determined to be accompanied by studies unreasonable in scope, adopted in bad faith, or otherwise arbitrary or capricious. *Mitchell v. Kemp*, 575 N.Y.S.2d 337, 176 A.D. 2d 859 (N.Y. App. 1991) (moratoria unconstitutional on due process grounds, where town gave no satisfactory reason for five-year delay in enacting permanent zoning ordinance); *Q.C. Const. Co. Inc. v. Gallo*, 649 F. Supp. 1331 (D.R.I. 1986), *aff'd*, 836 F.2d 1340 (1st Cir. 1987) (due process violation where city imposed moratorium on sewer hookups but made no effort to study or remedy problem giving rise to moratorium). Where the government enacts a moratorium with the intent of blocking a specific development, with no legitimate, good faith interest in addressing a larger planning or environmental concern, unlawful discrimination may be found. *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687, 119 S. Ct.

1624, 143 L. Ed. 2d 882 (1999); *see also Williams*, 907 P.2d at 705.

In this case, the studies undertaken by TRPA during the thirty-two-month moratorium were specifically tied to the development of standards to slow the eutrophication of Lake Tahoe and to meet the charge given TRPA under the Tahoe Regional Planning Compact to address this problem within a thirty-month period. *Tahoe-Sierra Preservation Council*, 216 F.3d at 781-82 (accepting the district court's finding of fact that "TRPA worked diligently to complete the regional plan as quickly as possible"). Thus, even under an as-applied analysis, the taking claim should fail.

Three important principles underlie the need for temporary moratoria. Robert H. Freilich, *Interim Development Controls: Essential Tools for Implementing Flexible Planning and Zoning*, 49 J. URBAN L. 65, 77-80 (1971) (cited by the Ninth Circuit below, *Tahoe-Sierra*, 216 F.3d at 777). First, reasonable moratoria allow the regulating body the necessary time to study and formulate solutions to significant land use and environmental problems affecting society. Elizabeth A. Garvin & Martin L. Leitner, *Drafting Interim Development Ordinances: Creating Time to Plan*, LAND USE LAW AND ZONING DIG., June 1996, at 3.

The range of planning and public policy objectives that may necessitate a moratorium on development include the timing and phasing of development to the provision of adequate public facilities and infrastructure. *See Golden v. Ramapo Planning Bd.*, 285 N.E.2d 291, 334 N.Y.S.2d 138, 30 N.Y.2d 359 (N.Y. 1972), *app. dismissed*, 409 U.S. 1003 (1972) (upholding timed and phased multi-year development controls to assure that adequate public services will be provided in accordance with a long-term capital improvement plan); *Schenck v. City of Hudson Village*, 114 F.3d 590 (6th Cir. 1997); *Construction Industry*

Ass'n v. City of Petaluma, 522 F.2d 897, 909 (9th Cir. 1975) (both upholding City numerical allocation of development permits over multi-year phasing programs based on comprehensive and intensive growth studies and capital improvement analysis); *see also* Robert H. Freilich, FROM SPRAWL TO SMART GROWTH: SUCCESSFUL LEGAL, PLANNING, AND ENVIRONMENTAL SYSTEMS (1999); *see generally*, Timothy J. Dowling, *Reflections on Urban Sprawl, Smart Growth and the Fifth Amendment*, 148 U. PA. L. REV. 873 (2000).

Petitioners themselves concede the validity of "a planning or time out moratorium of the kind sometimes used by planning agencies to provide needed breathing space." Petitioners' Brief at 4-5. By this extraordinary admission, Petitioners concede that if this case involved a temporary moratorium, the moratorium would have been valid. Furthermore, Petitioners assert that: "although dubbed temporary it was actually a substantive regulation rather than a procedural planning device and it made a dramatic change in TRPA's land use plan." *See id.* at 5.

This Court, however, did not accept this case on a challenge to a permanent regulation. The question presented asks, "whether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property. . . . " *Tahoe-Sierra*, 2001 WL 69237 (U.S.). The case should be dismissed on the basis that *certiorari* was improvidently granted, or alternatively, the order of the Court of Appeals should be affirmed, since Petitioners concede that a temporary moratorium would be valid and hence not a taking.

Temporary moratoria also constitute a valid response to imminent public health and safety threats. Indeed, it was such a concern for the immediate safety of the public that prompted Los Angeles County to enact an interim

ordinance prohibiting development within a flood protection area to protect from loss of life, a temporary moratorium that was eventually upheld on remand from this Court even though all use was prohibited during the thirty-month period. *First English*, 482 U.S. 304 (1987), *on remand*, 210 Cal. App. 3d 1353, 258 Cal.Rptr. 893 (Cal. App. 1989), *cert. denied*, 493 U.S. 1056 (1990); *see also Cappture Realty Corp. v. Bd. of Adjustment*, 133 N.J. Super. 216, 336 A.2d 30 (N.J. Super. App. Div. 1975) (upholding a temporary moratorium on construction within designated flood prone areas while flood control studies were completed); *Orleans Builders & Developers v. Byrne*, 186 N.J. Super. 432, 453 A.2d 200 (N.J. Super. App. Div. 1982) (upheld eighteen-month moratorium to facilitate environmental protection for the vast area of the New Jersey Pine Barrens). In the case *sub judice*, the TRPA's thirty-two-month moratorium was for a duration directly tied to the task before it, specifically, to adopt environmental carrying capacities and to develop a new regional plan, *Tahoe-Sierra*, 216 F.3d at 767-68.

In each of these circumstances, government was confronted with a planning, environmental, or public safety threat of considerable magnitude and immediacy. In each case, the government found that a temporary halt on development was necessary to accomplish legitimate planning purposes precedent to the eventual regulation. David Heeter, *Interim Zoning Controls: Some Thoughts on Their Uses and Abuses*, 2 MGMT. & CONTROL OF GROWTH 409, 411 (S. Scott Ed. 1975).

The second principle underlying the need for temporary planning moratoria is the prevention of nonconforming uses or development inconsistent with the purposes and policies of the planning legislation being formulated. When developers expect that a regulating body is studying a particular planning or environmental issue, and, in

fact, may adopt regulations to address that issue, there inevitably will be a rush to secure building permits under current regulations. Rohan at §22.01[1]. *See also SCA Chemical*, 636 S.W.2d at 436-37 ("SCA Chemical . . . was engaged in a race to avoid the more stringent zoning and permit requirements . . . contained in the new ordinance"). One of the first courts to address temporary moratoria summed up the problem as follows:

> [A]ny movement by the governing body of a city to zone would, no doubt, frequently precipitate a race of diligence between property owners, and the adoption later of the zoning ordinance would in many instances be without effect to protect residential communities – like locking the stable after the horse is stolen.

Downham v. City Council of Alexandria, 58 F.2d 784, 788 (E.D. Va. 1932).[4]

Courts have recognized the illogical result that would accrue were regulatory bodies simultaneously authorized to control and limit the private use of land, but prohibited from imposing temporary prohibitions on use during the development of those controls and limitations. As stated in *Chicago Title and Trust Co. v. Village of Palatine*, 22 Ill. App. 2d 264, 160 N.E.2d 697, 700 (Ill. App. 1959):

> It would be utterly illogical to hold that, after a zoning commission had prepared a comprehensive zoning ordinance or an amendment thereto, which was on file and open to public inspection and upon which public hearings had been held, and while the ordinance was under consideration, any person could by merely filing an

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[4] In fact, as the Ninth Circuit opinion points out, a race of diligence occurred prior to the adoption of the Tahoe Regional Planning Compact of 1980. *Tahoe-Sierra*, 216 F.3d at 777, n.15.

> application compel the municipality to issue a permit which would allow him to establish a use which he either knew or could have known would be forbidden by the proposed ordinance, and by so doing nullify the entire work of the municipality in endeavoring to carry out the purpose for which the zoning law was enacted.

See Walworth County v. Elkhorn, 27 Wis. 2d 30, 133 N.W.2d 257 (Wis. 1965); *Miller*, 234 P. at 388 (Cal. 1925).

The third principle underlying temporary planning moratoria is the facilitation of public debate and input into the legislative process. Unless the development industry, landowners impacted by development activity, and public interest groups have participated in the planning process, regulations likely will fail to protect the full range of community values and to accomplish the intended goals of the governing body. As stated by the Supreme Court of Minnesota, one of the "persuasive reasons for permitting moratorium ordinances [is] to derive the benefits of permitting a democratic discussion and participation by citizens and *developers* in drafting long-range use plans." *Almquist*, 245 N.W.2d at 826 (emphasis added). *See also Collura v. Town of Arlington*, 367 Mass. 881, 329 N.E.2d 733 (Mass. 1975) (noting that "with the adoption of an interim [moratorium a developer] is made aware that a new plan is in the offing and is thus able to participate in the debate over what that new plan should contain").

II. TEMPORARY MORATORIA CONSTITUTE NORMAL DELAYS IN THE DEVELOPMENT APPROVAL PROCESS

In *First English*, this Court expressly recognized the validity of "normal delays" in the development approval process. *First English*, 482 U.S. at 321. Professor Frank Michelman of Harvard Law School, in his review of *First English*, states: "the *First English* decision [does] not reach regulatory enactments, even totally restrictive ones, that are expressly designed by their enactors to be temporary . . . ." Frank Michelman, *Takings*, 88 COLUM. L. REV. 1600, 1621 (1988). The subsequent history of *First English* confirms Michelman's reasoning. Upon remand of *First English*, the California Court of Appeals found that the thirty-month moratorium to prevent flooding was not a temporary taking, 258 Cal. Rptr. 893 (1989), and this Court denied *certiorari*, 493 U.S. 1056 (1990). Numerous courts have relied on *First English* to hold that temporary development moratoria do not amount to a taking of property. *Sun Ridge Dev. v. City of Cheyenne*, 787 P.2d 583 (Wyo. 1990); *Estate of Scott v. Victoria County*, 778 S.W.2d 585 (Tex. App. 1989); *Woodbury Place Partners v. City of Woodbury*, 492 N.W.2d 258 (Minn. Ct. App. 1993).

The *First English* "normal delays" holding stems directly from *Agins*, 447 U.S. 255, where it was argued that aborted condemnation proceedings that lasted for a year effected a taking by interfering with the owner's ability to sell or develop the land during the period. The pendency of the condemnation proceedings in *Agins* had a greater restrictive effect than a temporary moratorium: it prevented the owners from selling as well as developing the property until the city determined the appropriate use for the property. The conclusion that there was no taking in *Agins* directly supports the finding that there is no taking when the government imposes a temporary moratorium on development. *Agins* specifically rejected the notion that the public should be held liable for losses caused by delays "during the process of governmental decision making." *Id.* at 263 n.9. A development moratorium in support of a comprehensive land use planning effort is precisely the type of delay associated with the "process of governmental decision making" referred to in

Agins and was the progenitor of the phrase used in *First English*: "normal delays in the development approval process" are not takings. *First English*, 482 U.S. at 321.

Consistent with this self-evident reading of *Agins*, a number of lower courts have rejected takings challenges to development moratoria. In *Zilber v. Town of Moraga*, the Court rejected the claim that a moratorium pending completion of an open space preservation study resulted in a taking, stating that the claim was "akin to one rejected in *Agins*." 692 F. Supp. 1195, 1206 (N.D. Cal. 1988). *See also Williams*, 907 P.2d at 704 (relying on *Agins* to reject claim that a development moratorium worked a taking, and observing that "even if the ability to sell or develop- . . . property is restricted during [a] moratorium, the landowner is free to continue with sale or development once the regulation is lifted"). *C.f. Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1237 (9th Cir.), *cert. denied*, 573 U.S. 870 (1994) (relying on *Agins* to reject a substantive due process challenge to a development moratorium).

It is incumbent upon the governing body of any agency imposing a moratorium to limit its duration to an amount of time that is reasonable and necessary. Rohan at §22.02[2]. As long as the delay is not "extraordinary" in light of the severity and complexity of the problem, the duration of the otherwise valid moratorium will constitute a "normal delay in the development approval process." *First English*, 482 U.S. at 321. The overwhelming weight of decisions by other federal and state courts supports the conclusion that temporary moratoria in effect for reasonable periods of time similar to the duration of the TRPA restriction do not result in a taking. *See Santa Fe Village Venture v. City of Albuquerque*, 914 F. Supp. 478 (D. N.M. 1995) (thirty-month moratorium associated with effort to create national monument not a taking);

Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n, 400 F. Supp. 1369 (D. Md. 1975) (five-year moratorium on sewer hookups does not render land "worthless or useless so as to constitute a taking"); *Woodbury Place Partners*, 492 N.W.2d 258 (Minn. Ct. App. 1992) (two-year moratorium on development pending completion on interstate intersectional location study not a taking); *Cappture*, 336 A.2d 30 (N.J. Super. App. Div. 1975) (four-year moratorium imposed on construction in flood-prone lands not a taking); *Friel v. Triangle Oil Co.*, 76 Md. App. 96, 543 A.2d 863 (Md. App. 1988) (twenty-four-month interim ordinance not a take); *Estate of Scott*, 778 S.W.2d 585 (Tex. App. 1989) (two-year interim ordinance not a taking); *Matter of Rubin v. McAlvey*, 29 App. Div. 2d 874, 288 N.Y.S.2d 519 (1968) (two-year interim development ordinance valid); *First English*, 258 Cal. Rptr. 893 (delay of thirty months not unreasonable).[5]

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[5] *See Orleans Builders*, 453 A.2d at 208 (observing that "under decisional law in this state as well as in other jurisdictions" moratoria "leading to formulation of a comprehensive system for the area's development which would safeguard its environment" are not compensable), *McCutchan Estates Corp. v. Evansville Vanderburgh County Airport Auth. Dist.*, 580 N.E.2d 339 (Ind. Ct. App. 1991) (nine-month delay not extraordinary as a matter of law), *Dufau v. United States*, 22 Cl. Ct. 156 (Fed. Cl. 1990) (sixteen-month delay not extraordinary as a matter of law).

III. NEITHER THE SUPREME COURT'S REMEDIAL DECISION IN *FIRST ENGLISH*, NOR ITS DECISION IN *LUCAS*, INVOLVING PERMANENT CATEGORICAL TAKINGS, UNDERMINES, MUCH LESS CONTRADICTS, THE CONCLUSION THAT A TEMPORARY MORATORIUM ON LAND DEVELOPMENT DOES NOT EFFECT A TAKING

The U.S. Supreme Court's decisions in *First English*, 482 U.S. 304 (1987) and *Lucas*, 505 U.S. 1003 (1992), did not create a new approach that would support the conclusion that a temporary moratorium on development effects a taking. To the contrary, a careful reading of these decisions demonstrates that they confirm the constitutionality of TRPA's moratorium.

A. *First English*

In *First English*, this Court granted review solely to address the issue of the appropriate *remedy* in a regulatory takings case.[6] Accepting for the sake of argument

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[6] The fact that *First English* involved a temporary moratorium was irrelevant to the holding in the case. The Petitioners' Petition for Certiorari is quite misleading in this regard. *First English*'s only relevance to this case is the dicta regarding 'normal delays'. The decision in *First English* as to the remedy could easily have been made in any of the cases where the court declined to accept jurisdiction by reason of ripeness. (*San Diego Gas & Electric v. City of San Diego*, 450 U.S. 621, 101 S. Ct. 1287, 67 L. Ed. 2d 551 (1981); *Agins*, 447 U.S. 255 (1980); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985), and *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 106 S. Ct. 2561, 91 L. Ed. 2d 285 (1986)). *See* Thomas E. Roberts, *Moratorium And Categorical Regulatory Takings: What* First English *and* Lucas *Say and Don't Say*, 31 ENVT'L L. REP. 11037 (Sept. 2001).

plaintiff's allegations that the restrictions effected a taking, 482 U.S. at 313, the Court addressed the question "whether abandonment [of regulations] by the government [after a judicial order finding a taking] requires payment of compensation for the period of time during which [the] regulations" were in effect. *Id.* at 318. The Court answered this question in the affirmative, holding that, assuming a government regulation works a taking in the first place, subsequent rescission of the regulation does not foreclose a claim for compensation. "We merely hold that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *Id.* at 321.[7]

Temporary takings apply to the period of time between application of a permanent restriction and subsequent invalidation,[8] not the period during which a temporary measure is applied and is not a taking in the first place. The obvious reach of *First English* is to compensate for permanent takings that last a temporary period of time, *i.e.*, regulations subsequently rescinded or declared invalid, but not to compensate commonplace temporal regulations such as the TRPA's thirty-two-month temporary moratorium, which have not been held to be a taking in the first place. Bozung & Alessi, *Recent Developments in Environmental Preservation and the Rights*

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[7] *See Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1073 n.4 (11th Cir. 1996), holding that *First English* is not applicable to moratoria or other temporary actions; rather, *First English* is applicable only where the ordinance is indefinite in duration and would expire only if declared unconstitutional or repealed.

[8] The opinion presupposes that "temporary regulatory takings" means "regulatory takings which are ultimately invalidated by the courts." *First English*, 482 U.S. at 310.

of Property Owners, "Moratoria as Regulatory Takings After First English," 20 URB. LAW. 969, 1014-1030 (1988).

Thus, the *First English* ruling focuses exclusively on the appropriate remedy in a regulatory taking case. The Court in *First English* did not establish that a restriction temporarily depriving a landowner of the use of property constitutes a taking. Moreover, as the majority made clear, the Court was not addressing "the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like." *Id.* at 321. This reading of *First English* is confirmed by the California Court of Appeals' resolution of the takings issue on remand. Addressing for the first time the actual merits of the takings claim, the Court of Appeals ruled that the County's interim ordinance did not effect a taking. *First English*, 258 Cal. Rptr. at 906. Emphasizing the fact that the ordinance was temporary by design, the court concluded:

> As an independent and sufficient grounds for our decision, we further hold [that] the interim ordinance did not constitute a "temporary unconstitutional taking even if we were to assume its restrictions were too broad if permanently imposed on First English. This interim ordinance was by design a temporary measure – in effect a total moratorium on any construction on First English's property while the County conducted a study to determine what uses and what structures, if any, could be permitted on this property consistent with considerations of safety." "We do not read the U.S. Supreme Court's decision in *First English* as converting moratoriums and other interim land use restrictions into unconstitutional 'temporary takings' requiring compensation unless, perhaps, if these

> interim measures are unreasonable in purpose, duration or scope."

Id.

This Court denied the petition for *certiorari* filed by the owner in response to this decision. *First English*, 493 U.S. 1056 (1990). Although the Court's denial of *certiorari* is not precedential, it clearly affected the ultimate result in *First English*.

Other courts have read *First English* similarly, and refused to hold that temporary moratoria effect a temporary taking. *Corn*, 95 F.3d 1066, 1073 (*First English* not applicable to temporary moratoria); *Dufau*, 22 Cl. Ct. 156 (1990) (following *First English*, and concluding that sixteen-month delay during Clean Water Act section 404 processing is not a taking); *Zilber*, 692 F. Supp. at 1206 (relying on *First English* to support conclusion that eighteen-month development moratorium is a "normal delay" that does not result in a taking).

For Petitioners to read *First English* as establishing a new species of "temporary takings" that would support a finding of a taking based on a "temporary" moratorium reflects a fundamental misreading of that decision.

B. *Lucas*

In *Lucas*, this Court found a *per se* taking where a South Carolina coastal protection law permanently barred a landowner from developing the property and reduced the market value of the property to zero. *Lucas*, 505 U.S. 1003. Nothing in the reasoning in *Lucas* suggests that the Court's ruling applies to temporary restrictions on development. Indeed, the Court was quite clear in noting that its ruling was likely to apply only in "rare" cases, a statement which contradicts the idea that *Lucas* could

apply to the frequently used moratorium tool. *See Williams*, 907 P.2d at 706 ("Importantly, the *Lucas* court specifically noted that categorical temporary takings were expected to be a rare event, occurring only under extraordinary circumstances. 'Stop gap' or interim zoning moratoria, however, play an important role in land use planning and are commonly employed."). *See also Palazzolo*, 121 S. Ct. 2448 (confirming that *Lucas* is only applicable in "relatively rare" circumstances).

The *Lucas per se* rule was held to be applicable only where property is permanently rendered without use and thus valueless in perpetuity.[9] *Lucas*, 505 U.S. at 1012 ("taking was unconditional and permanent"); and 505 U.S. at 1018 ("the relatively rare situation where the government has deprived the owner of all economically beneficial use"). *See* R. Meltz, D. Merriam and R. Frank, THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND USE CONTROL AND ENVIRONMENTAL REGULATION, pp. 139-141 (Island Press 1999); D. Mandelker, LAND USE LAW 2.18 (4th ed. 1997); R. Freilich, E. Garvin & D. Martin, *Regulatory Takings: Factoring Partial Deprivation into the Taking Equation*, Ch. 8 in TAKINGS (ABA, David Callies, ed. 1996). Justice Scalia, in *Lucas*, emphasized that the *certiorari* petition squarely raised the question of whether regulatory prohibitions had rendered Lucas' beachfront land permanently valueless. *Lucas*, 505 U.S. at 1007; and 505 U.S. at 1020 n.9. *See K&K Const., Inc. v. Dept. of Nat. Resources*, 456 Mich. 570, 575 N.W.2d 531 (1998) (*Lucas* applies only where the

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[9] Treating use and value as synonymous for takings analysis is common sense, for if property retains value as determined by the market, by definition it retains economically viable use through sale for market value. *See Lucas*, 505 U.S. at 1017 ("What is land but the profits thereof?" (citation omitted)).

property owner is permanently deprived of all use and value looking at the property as a whole).[10]

The draconian prohibitions of the South Carolina Act were described as the "*complete extinguishment* of his property's value" and a "*permanent* ban on construction insofar as Lucas' lots were concerned," *Lucas*, 505 U.S. at 1009 (emphasis added), and government has deprived a landowner of all economically beneficial uses. *Lucas*, 505 U.S. at 1017-1018 (emphasis added), and that "all" means "all." *Lucas*, 505 U.S. at 1016 n.7; 505 U.S. at 1019 n.8. Justice Scalia refused to entertain the argument (raised by the dissent) that "valueless" meant something less than a complete and total destruction of all use and value or for a period of time less than permanent. *Lucas*, 505 U.S. at 1020 n.9; 505 U.S. at 1016 n.7; 505 U.S. at 1019 n.8. A similar rule applies in physical appropriation takings cases, *Loretto v. Manhattan Teleprompter CATV Corp.*: "Our holding today is very narrow. We affirm the traditional rule that a permanent physical occupation of property is a taking. . . . We do not, however, question the equally substantial authority upholding a state's broad power to impose appropriate restrictions upon an owner's *use* of his property." 458 U.S. 419, 441 (1982) (emphasis in original).

"All value" as used in *Lucas* means that the regulation has permanently destroyed all value, both in a physical and temporal sense. *Lucas*, 505 U.S. at 1016 n.7, 1019 n.8. *See Woodbury Place Partners*, 492 N.W.2d at 260-61 (two-year building moratorium not a *Lucas per se* take

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[10] In *Concrete Pipe*, this Court, looking at the property as a whole, determined that where only a 59% deprivation occurred, the plaintiff's attempt to "shoehorn" the challenge into the *Lucas per se* claim would be rejected. *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 643-644 (1993).

despite stipulated lack of all economically viable use for two years). The *Woodbury* trial court had applied the *Lucas per se* test. The Court of Appeals reversed, relying on both *Lucas* and *Agins*:

> *We interpret the phrase "all economically viable use for two years" as significantly different from "all economically viable use" as applied in Lucas. The two-year deprivation of economic use is qualified by its defined duration.* That the Woodbury property's economic viability was delayed, rather than destroyed, is implicitly recognized in the language of the stipulation. "[A]ll economically viable use from March 23, 1988 to March 23, 1990" recognizes that economic viability exists at the moratorium's expiration.
>
> * * *
>
> Delaying the sale or development of property during the governmental decision-making process may cause fluctuations in value that, absent extraordinary delay, are incidents of ownership rather than compensable takings. *Agins v. Tiburon*, 447 U.S. 255, 263 n.9, 100 S. Ct. 2138, 2143 n.9, 65 L.Ed.2d 106 (1980). (emphasis supplied).

Woodbury Place Partners, 492 N.W. 2d at 261-62.

If the regulation is temporary or if any use or any value remains, the *Lucas per se* rule does not apply. *See Palazzolo*, 121 S. Ct. 2448 (rejecting a *Lucas* claim where small residual value has been left in the property, remanding the case for a *Penn Central* review). In *Penn Central*, this Court identified three factors to guide *ad hoc* factual inquiries: (1) the economic impact of the regulation; (2) the extent to which the regulation interferes with investment-backed expectations; and (3) the character of the government regulation. *Penn Central*, 438 U.S. at 124; *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225, 106 S. Ct. 1018, 89 L. Ed. 2d 166 (1986). In the present

case, Petitioners do not argue, and on a facial attack cannot argue, that the moratorium constituted a *Penn Central* take. Nor could they have succeeded in doing so because the economic impact was minimal due to the temporary nature of the moratorium; Petitioners could have had no investment-backed expectation that it could develop land in an environmentally sensitive area free from reasonable, temporary delays; and the exercise of the TRPA police power to prevent environmental harm to Lake Tahoe caused by immediate development in sensitive areas is the highest form of governmental action to protect health and safety. *Keystone*, 480 U.S. at 489-491; *Lucas*, 505 U.S. at 1023-1024; *Trobough v. City of Martinsburg*, 120 F.3d 262 (4th Cir. 1997).

So far as *amici* are aware, no court yet to address the issue has ruled that a temporary moratorium can result in a *Lucas*-type taking. Indeed, all the decisions are to the contrary. *See Kelly v. Tahoe Reg'l Planning Agency*, 855 P.2d 1027, 1033-34 (Nev. 1993), *cert. denied*, 510 U.S. 1041 (1994) (rejecting takings challenge to temporary restrictions which, unlike the restrictions in *Lucas*, "temporarily limit, rather than forever preclude development in environmentally sensitive areas"); *Williams*, 907 P.2d at 706 (moratorium on new development in gambling district did not effect a taking under *Lucas*); *Santa Fe Village Venture*, 914 F. Supp. at 483 (citing *Lucas* and *First English*, and rejecting claim that thirty-month moratorium resulted in taking). Just four months ago, the Florida Supreme Court in *Keshbro v. City of Miami*, 2001 WL 776555 (Fla. 2001) held that temporary moratorium in the land use and planning arena does not constitute a *Lucas* take, citing the Ninth Circuit Court of Appeals opinion.[11]

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[11] *Keshbro* did find that a nuisance abatement board order closing a multi-rental facility for illegal drug operation

IV. TAKINGS ANALYSIS REQUIRES CONSIDERATION OF THE PROPERTY IN ITS ENTIRETY, INCLUDING TIME AS WELL AS SPATIAL AND USE ELEMENTS, AND TRPA'S ACTIONS DID NOT CONSTITUTE EITHER A FACIAL *LUCAS PER SE* TAKE OR A FACIAL *PENN CENTRAL* TAKE

In *Penn Central* the Supreme Court explained that:

> 'Taking' jurisprudence does not divide a single parcel into discrete segments and then attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses both the

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constituted a *Lucas* taking for the one-year period of the closure, citing *State ex rel. Pizza v. Rezcallah*, 702 N.E.2d 81, 89 (Ohio 1998) (finding such closure orders to be in the same footing as "seizures" of property). *Keshbro* distinguished such closures from temporary moratoria in the "land use and planning arena, where an entirely different set of considerations are implicated from those in the context of nuisance abatement where a landowner is being deprived of a property's dedicated use". *Keshbro, Inc. v. City of Miami*, 2001 WL 776555, 6 (Fla. 2001). These two cases and one Washington intermediate court of appeals case differ from temporary moratoria because they find a taking from the interference with the property owner's ability to lease his existing property, to gain physical access to the land and buildings. Nevertheless these cases are also wrongly decided because they fail to properly analyze *Lucas'* holding. *See Zeman v. City of Minneapolis*, 552 N.W.2d 548 (Minn. banc 1996) where the court held that a temporary revocation of an apartment license to abate nuisances was not subject to the *Lucas per se* rule because the apartment license was taken, if at all, only temporarily. 552 N.W.2d at 553 n.4. The court held that temporary nuisance closures should be analyzed using *Penn Central* and concluded that since the ordinance furthered a legitimate state interest in deterring criminal activity, it prevented a public harm and no taking resulted. 552 N.W.2d at 553-555.

> character of the action and on the nature and extent of the interference with rights in the parcel as a whole.

Penn Central, 438 U.S. at 130-31.[12] Consistent with *Penn Central*, the Supreme Court declined to find a categorical take in *Andrus*, 444 U.S. 51 (1979). The Court reasoned that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Id.* at 65-66.[13] When a moratorium temporarily restricts use of property, the rights in only one particular temporal segment have been restricted, not all rights. When the effect of a moratorium is viewed in the context of an owner's entire property, it is apparent there has been no *Lucas*-type taking.

Petitioners assert that viewing the parcel as a whole was rejected by this Court in *First English*. They cite to the vigorous dissent of Judge Kozinski on the denial of the motion to rehear the case *en banc*, where he accuses the majority of having adopted the statement made by Justice Stevens in dissent: "Regulations are three dimensional; they have depth, width and length. . . . Finally, and for purposes of this case, essentially, regulations set forth the duration of the restrictions." *First English*, 482 U.S. at 331 (Stevens, J., dissenting). Petitioners assert that the majority in *First English* rejected Justice Stevens' reasoning: "In *First English*, this Court directly faced the question of

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[12] The *Penn Central* formalization for takings analysis has recently been strongly reaffirmed by this Court in *Palazzolo*, just this past term, 121 S. Ct. 2448 (U.S. June 28, 2001).

[13] It is remarkable that at the beginning of the Twenty-First Century the fundamental scientific principle of our time, Einstein's recognition that space and time are the third and fourth dimensions of physical matter, would not be regarded as a reality by the courts.

whether the length of time made any constitutional difference. The dissent thought it did (482 U.S. at 318). The majority, however, decided it did not (482 U.S. at 321)." Petitioner's Brief at 21.

In fact, the *First English* majority did not reject Justice Stevens' dissent on this point at all – it did not rule on this point or on the "parcel as a whole" theory. It rejected merely the dissent's proposition that the remedy for takings was invalidation, not compensation. On the issue of temporary takings, the Court could not have been more explicit. Relying heavily on *United States v. Dow*, 357 U.S. 17, 78 S. Ct. 1039, 2 L. Ed. 2d 1109 (1958) (abandonment of condemnation proceedings already constituting a taking) and three cases involving direct condemnation of leasehold interests for shorter periods of time, the Court held: "Where this burden results from governmental action that amounted to a taking, the Just Compensation Clause requires that the government pay the landowner for the value of the use of the land during this period, *C.f. United States v. Causby*, 328 U.S. at 261." *First English*, 482 U.S. at 319. It was not time that was critical to *First English* but whether the governmental action had already amounted to a taking. The property at issue in the case *sub judice* retained value and there were a range of uses available, as well as all future uses available after the thirty-two-month moratorium period. If a regulation is temporary, all reasonable use has *not* been denied because all future uses remain.[14]

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[14] Property interests under the common law explicitly deal with the length of time that an interest lasts. One of the geniuses of the common law system distinguishing it from its European civil law counterparts was the early recognition that estates in land have present and future interests. *See Lewis Simes*, FUTURE INTERESTS, *Introduction* 2-3 (1951) "In Anglo-American law there are two devices by which the owner of property projects his will into the future. They are the trust and the future interest." The latter, for the most part, are alienable, assignable and inheritable, and support standing for actions in executory interests and reversions following life estates and terms of years. Ashbel G. Gulliver, LAW OF FUTURE INTERESTS, at 73 (1959).

Finally, there are practical planning and administrative reasons for considering the entire property when determining whether regulatory impact amounts to a taking. Reasonable regulation in pursuit of the public interest will necessarily burden *certain pieces* of the owner's physical property. However, for courts to base their taking analysis on just the affected pieces would result in the irrational circumstance of government having to compensate the property owner for the incremental impact of the regulation, regardless of the overall remaining usefulness of the entire parcel. *See Keystone*, 480 U.S. 470. The unworkable application of this reasoning became apparent in Washington, when the state supreme court first held that a greenbelt set-aside that limited the use of only a portion of certain properties amounted to an unconstitutional taking. *Allingham v. City of Seattle*, 109 Wash.2d 947, 948, 749 P.2d 160 (Wash. 1988), *amended by*, 757 P.2d 533 (Wash. 1988). Just two years later, recognizing the catastrophic nature of its prior holding, the court reversed itself, recognizing that:

> [N]either state nor federal law has divided property into smaller segments of an undivided parcel of regulated property to inquire whether *pieces* of it has been taken. . . . Rather, we have consistently viewed a parcel of regulated property in its entirety. Federal case law has also specifically refused to focus its inquiry upon a given portion of a regulated property. . . . To the extent *Allingham* is inconsistent with the foregoing analysis, it is hereby overruled.

Presbytery of Seattle v. King County, 114 Wash.2d 320, 334-35, 787 P.2d 907 (1990) (emphasis in original) (citations omitted).

Similarly, the temporal element of property ownership must also be viewed in the entirety. *See Agins*, 447 U.S. at 258; *Andrus*, 444 U.S. at 65-66. Unless the *entire* term of ownership is recognized as the appropriate temporal denominator over which to measure the relative impact of the challenged regulation, results as irrational as those recently recognized by the Washington Supreme Court will characterize takings jurisprudence, and accordingly will diminish the traditional rights of state and local governments to regulate land in a reasonable manner. *Euclid*, 272 U.S. 365 (1926).

CONCLUSION

The grant of *certiorari* should be dismissed as improvidently granted, or in the alternative, the Ninth Circuit opinion holding that no categorical taking occurred under the Fifth Amendment should be affirmed.

Respectfully submitted,

ROBERT H. FREILICH*
E. TYSON SMITH
JASON M. DIVELBISS
FREILICH, LEITNER & CARLISLE
4435 Main Street
Kansas City, MO 64111
(816) 561-4414

* *Counsel of Record for Amici Curiae*

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In The

Supreme Court of the United States

TAHOE SIERRA PRESERVATION COUNCIL, INC., *et al.*,

Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF NATIONAL AUDUBON SOCIETY, NATURAL RESOURCES DEFENSE COUNCIL, NATIONAL WILDLIFE FEDERATION AND SIERRA CLUB IN SUPPORT OF RESPONDENTS

JOHN D. ECHEVERRIA
Counsel of Record
ENVIRONMENTAL POLICY PROJECT
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9850

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BRIEF *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

The *amici curiae*, national conservation organizations representing citizens in California, Nevada and across the country, urge the Court to affirm the judgment of the Court of Appeals.[1]

SUMMARY OF ARGUMENT

The Court should reject the proposal that it jettison the parcel as a whole rule in taking cases involving regulatory use restrictions. This established rule is essential to a balanced, workable doctrine of regulatory takings. Applying the parcel as a whole rule in this case, TRPA's moratorium, which only deferred development and did not eliminate all economic value, did not effect a *Lucas*-type taking.

This case calls for no basic change in the law because the Constitution already affords property owners appropriate remedies for ostensibly temporary moratoria which are in fact indefinite or permanent, as well as for arbitrary or otherwise invalid moratoria. This case involves no claim under *Penn Central*, and the Court should not speculate about how *Penn Central* (which does not actually support a distinct taking claim) might be applied in some other case.

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[1] Counsel for the parties have consented to the filing of this brief. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, made a monetary contribution to the brief's preparation or submission. *See* Rule 37.

Finally, the Court should reject many of the assertions by petitioners and their *amici* about the economic and political implications of proposals to expand regulatory takings doctrine. Property owners do not need expanded protection under the Takings Clause to counter political powerlessness; extensive takings liability would not make government decision-making more economically rational; and expanded takings liability would not simply impose a modest condition on the pursuit of important public objectives.

ARGUMENT

I. The Court Should Reject the Proposal That it Jettison the Well-Established Parcel as a Whole Rule.

Petitioners and their *amici* mount a radical assault on the rule that a taking claim based on a regulatory use restriction must be analyzed in relation to the "parcel as a whole." Under conventional takings analysis, a moratorium is generally not viewed as a taking because it lasts only a few years (or less) and has no affect on the owner's use of the property outside the moratorium period. Borrowing from the Court's approach to taking claims based on *physical occupations*, petitioners and their *amici* contend that a moratorium should be analyzed in isolation without regard to the uses the owner has made of the property and can make of the property during the rest of his ownership. As they frankly acknowledge, according to their reasoning, the parcel as a whole rule should be discarded for *all* regulatory taking challenges based on use restrictions.

Even petitioners and their *amici* recognize that the trajectory of this argument takes them straight off a cliff. Accordingly, they advance various ad hoc proposals for possibly softening the consequences of the argument, such as a one-year-might-still-be-OK exception, *see* Brief of Institute for Justice, at 30, or an exception for "quite short" pauses in permitting, *see* Brief for Petitioners, at 49. In fact, the position of petitioners and their *amici* on the parcel issue is so fundamentally wrong that nothing can save it.

A. The Parcel as a Whole Rule Is an Essential Component of Takings Doctrine.

It would be difficult to overstate how central the parcel as a whole rule is to takings jurisprudence and what an extraordinary change in the law petitioners and their *amici* propose. As they acknowledge, it would compel the rejection of longstanding Court precedent.

The Court has articulated and applied the parcel as a whole rule many times. The Court has applied it in rejecting proposals to segment a single landholding into separate parcels geographically. *See Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 130-31 (1978); *Dolan v. City of Tigard*, 512 U.S. 374, 385 n.6 (1994). The Court also has rejected efforts to divide property into individual sticks based on the separately identifiable legal interests that make up property. *See Andrus v. Allard*, 444 U.S. 51, 65-66 (1979); *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 643-44 (1993). Finally, the Court has rejected efforts to segment property in the temporal dimension as

well. *See Block v. Hirsh*, 256 U.S. 135, 156 (1921); *Agins v. City of Tiburon*, 447 U.S. 255, 263 n.9 (1979).

The parcel as a whole rule is necessary to prevent takings doctrine from literally destroying government's capacity to function. As Justice Holmes famously remarked: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). If every taking claim had to be evaluated in relation to the affected interest or portion of the property, then regulation would "always" result in a taking. *Concrete Pipe*, 508 U.S. at 643. Jettisoning the parcel as a whole rule would, in effect, collapse the police power into the eminent domain power.

The parcel as a whole rule also prevents judicial intrusions into the affairs of the other branches and interference by the federal courts with the independent functioning of state and local governments. The parcel as a whole rule, because it keeps regulatory takings doctrine within a relatively narrow scope, implements the general presumption in favor of the constitutionality of legislative action and reinforces the principle that matters of social and economic policy should generally be resolved by the political branches. Absent the parcel as a whole rule, litigants could invoke the Takings Clause to force the courts to play the role of an imperial judiciary routinely resolving society's most important economic and social issues.

The parcel as a whole rule also has more practical justifications. An owner completely prohibited from

exploiting a property's economic value, *see, e.g., Lucas*, suffers a qualitatively different type of interference with his investment plans than an owner prohibited from developing only a portion of a larger property, *see, e.g., Dolan*. Thus, a regulation which destroys the value of a particular investment logically raises a more serious constitutional issue than a regulation which simply diminishes the value of an investment by restricting the use of a portion of the property.

In addition, the parcel as a whole rule allows for an accurate accounting of both the negative and the positive effects of regulation on property values. In evaluating a taking claim, "the[ ] benefits [of regulation] must be considered along with any diminution in market value that the [owners] might suffer." *Agins v. City of Tiburon*, 447 U.S. at 262. In the rare case where a regulation eliminates an entire property's economically viable use, there are, of course, no countervailing benefits to consider with respect to the particular property. On the other hand, if a regulation only restricts use of a portion of a property, under the parcel as a whole rule the courts can weigh both how the restrictions limit development opportunities and how they enhance the value of development opportunities that remain. Thus, in *Palazzolo v. Rhode Island*, 121 S.Ct. 2448 (2001), the Court's application of the parcel as whole was just and fair in part because the beneficial effects of the wetlands restrictions on a portion of the property (and on neighboring properties) went a long way toward explaining why the developable portion of the property increased in value so dramatically after the restrictions were imposed.

The rule has the same virtues in the temporal dimension. There is all the difference in the world between a regulation which blocks development permanently or indefinitely, and a temporary moratorium which by its express terms only lasts for a limited period. As an economic matter, if a planning moratorium succeeds in its purpose of helping to improve the quality of the community as a whole, a moratorium should enhance property values for development once it is lifted. Given that property owners routinely hold property for lengthy periods for eventual development or resale (in general and in the Tahoe basin in particular), there is no reason to assume that development moratoria necessarily have *any* adverse economic impacts on property owners.

If anything, the argument for property "segmentation" is at its very weakest ebb in the context of temporal restrictions. In the spatial dimension, there are at least arguably relevant legal subdivisions of property interests which could conceivably (but incorrectly in our view) justify property segmentation. *Cf. Lucas*, 505 U.S. 1016 n.7. By contrast, time is a natural continuum which does not lend itself to natural or easy legal subdivision.

Under the traditional parcel as a whole rule, the TRPA moratorium – and temporary planning moratoria in general – are clearly not facial takings under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). The moratorium did not eliminate development uses, it simply deferred them for a relatively brief period. As a result, the moratorium did not strip the property of all

economic value, if it had any adverse economic effect at all.[2]

B. Physical Occupations v. Restrictions on Use.

Contrary to the position of petitioners and their *amici*, the fact that a *physical occupation* may, in a sense, be deemed a taking of the affected portion does not support discarding the parcel as a whole rule for taking claims based on *use* restrictions.

In the leading Court precedent on physical-occupation takings, *see Loretto v. Tele-prompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the Court explicitly and repeatedly emphasized the distinction between physical occupations and use restrictions. The Court said, on the one hand, it "has often upheld substantial regulation of an owner's use of his own property." *Id.* at 425. On the other hand, the Court said next, "we have long considered physical intrusion by government to be a property restriction of an unusually serious character for the purpose of the takings clause." *Id.* The Court also cited several "recent cases confirm[ing] the distinction between

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[2] A telling statement in the TSPC monthly newsletter from the early 1980's suggests that many owners had little actual interest in developing their properties during the period of the moratorium. *See Tahoe Outlook*, July-August, 1983 Vol. 4. No. 4 ("The fact is that due to economic realities, the pressures to build on these remaining single-family lots has nearly evaporated. . . . If given the choice, it is now clear that most property owners would much prefer to sell – particularly for a full, fair cash price to a governmental entity that is ready and willing to pay such a fair price for their lands.")

a . . . physical occupation . . . and a regulation that merely restricts the use of property." *Id.* at 428, citing *United States v. Causby*, 328 U.S. 256 (1946); *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958). *See also id.* at 427, 436, 441 (discussing the differences between physical occupations and use restrictions).

The special status the Court has accorded physical occupations reflects the importance of the property, liberty as well as privacy interests threatened by an invasion of a citizen's personal physical space. As the Court said in *Loretto*, "an owner suffers a special kind of injury when a *stranger* directly invades and occupies an owner's property." *Id.* at 436 (emphasis in original). The Court continued: "such an invasion is *qualitatively more severe* than a regulation of the use of property. . . . " *Id.* (emphasis added).

The distinctive character of physical occupations is reflected in many aspects of the Court's taking jurisprudence. In *Loretto*, the Court established a special categorical rule for all permanent physical occupations of private property. By contrast, in *Lucas* the Court called for categorical treatment of use regulations only when the restrictions eliminated all economically viable use of the property, indicating that *most* use restrictions cannot be equated with physical occupations. Similarly, in *Dolan v. City of Tigard*, 512 U.S. 374 (1994) and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) , the Court articulated distinctive tests for evaluating takings claims based on permit conditions involving physical occupations of private property. In *City of Monterey v. Del Monte Dunes Ltd.*, 526 U.S. 687 (1999), the Court held that *Dolan* and *Nollan* do not apply to a claim based on a *use* restriction.

Against this backdrop, it is logical that a different "parcel rule" applies to physical occupations than to use restrictions. Given the "special" nature of the injury an owner suffers in the case of a physical occupation, and because any physical invasion literally affects an owner's privacy interests in the property as a whole, a physical occupation of a portion of a property can result in a taking. By contrast, because a regulatory use restriction rises to the level of a taking only in "extreme circumstances," *United States v. Riverside Bayview Homes*, 474 U.S. 121, 126 (1985), and does not invade the property in the same fashion, it is essential to differentiate between actual takings and those regulatory use restrictions which must be "borne to secure the advantage of living and doing business in a civilized society." *Andrus v. Allard*, 444 U.S. 51, 67 (1979). The parcel as a whole rule serves that crucial function.

C. The Futile Effort to Save the Segmentation Argument.

Even petitioners and their *amici* recognize that their argument leads to the unsupportable conclusion that every restriction on the use of property, no matter how minute in space or time, represents a taking. Their (reluctant and half hearted) efforts to save themselves from the consequences of their extreme legal position are unprincipled, impractical, and beyond the courts' competence and authority to administer.

The primary proposal is that the Court decree that a moratorium of no more than one year will be acceptable. This proposal obviously undercuts the entire argument

for treating temporary moratoria as takings in the first place; the Court's physical occupations precedents allow for no similar exception. For petitioners and their *amici* to acknowledge that *some* short-term moratoria may be permissible under the Takings Clause simply reinforces the conclusion that their effort to equate use restrictions with physical occupations will not wash. Furthermore, given the myriad array of planning challenges local governments face, this Court, which has limited land use expertise, is hardly in a position to set an appropriate maximum period for a moratorium that will suit all cases.

Another, more amorphous proposal is that the Court declare that a temporal restriction will not effect a takings so long as it is "quite short." This standard would improperly invite the courts to second guess the policy and technical judgments of local elected officials and land use planners, and would involve the Court in attempting to devise what essentially amounts to a legislative solution. In addition, it would generate an increased volume of litigation based on an uncertain legal test, imposing new legal burdens on local governments and greater legal uncertainty for regulators and the regulated alike.[3]

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[3] This possible exception draws some support from the Court's indication in *First English Evangelical Luthern Church v. County of Los Angeles*, 482 U.S. 304 (1987) that "normal delays" would not result in takings, *see id.* at 321. But, to be frank, this language is too ambiguous to support any fixed conclusion. It can be contended, of course, that "normal delays," such as to make "changes in zoning ordinances," are certainly broad enough to encompass development moratoria. But the larger point is that the Court seems to be describing an exception to a rule which the majority opinion does not actually articulate. One scholar has recently suggested that this portion of the *First English* opinion may represent a kind of judicial pentimento. *See* Thomas E. Roberts, "Moratoria as Categorical Regulatory Takings: What First English and Lucas Say and Don't Say," 31 *Envtl.L.Rep.* 11037, 11041 (2001). This explanation has at least the ring of factual authenticity.

Most importantly, however, this standard, like the proposed one-year exception, squarely contradicts the argument that temporary use restrictions are indistinguishable from physical occupations. In fact, short-term temporal restrictions on development are not takings because the parcel as a whole rule applies in takings cases based on use restrictions. Short term restrictions generally do not so severely burden the parcel as a whole that they amount to takings.

II. No Change in the Law is Required to Afford Owners Appropriate Opportunities to Challenge Sham or Arbitrary Development Moratoria.

Under existing law development moratoria of finite duration will rarely if ever raise a serious issue under the Takings Clause. The question presented by this case, therefore, is whether the Court should alter the legal status quo. In addressing this question the Court may wish to focus on whether existing constitutional and other legal remedies deal adequately with the types of legal concerns which the use of moratoria is likely to raise.

A. Existing Legal Remedies Are Adequate and Appropriate.

At the outset, one might ask, where is the beef? Petitioners and their *amici* have made no compelling case for dramatic judicial innovation. They have presented no persuasive evidence that this valuable planning tool creates economic injury or other unfairness, either in this case or in general. In addition, a number of state legislatures have enacted laws limiting the permissible duration of planning moratoria, *see, e.g.*, Montana Code Ann. § 76-2-306 (authorizing moratoria lasting up to 30 months), strongly suggesting that this issue is being adequately handled through the ordinary give and take of politics. As discussed in section III, there is no reason to believe that developers and other landowners are disadvantaged in the political process; if anything, the opposite is more likely to be the case.

As a constitutional matter, the use of planning moratoria appears to raise two potential types of legal concerns. The first is that a regulatory restriction, though labeled a temporary moratorium, might, in fact, be indistinguishable from a permanent or indefinite restriction. The second is that a moratorium, whatever its duration, might be enacted for some arbitrary or otherwise invalid reason. Existing law is adequate to address both types of concerns.

"Permanent" Moratoria. The first concern matches, of course, petitioners' version of this case, at least as reformulated for presentation in this Court. According to petitioners, TRPA enacted a prohibition on development in the early 1980's which, under the cover of different laws

and plans, has remained in force for several decades and continues in force today. They contend that TRPA's regulatory restrictions are legally indistinguishable from those at issue in *Lucas* and, therefore, there was a taking in this case.

Petitioners are entirely correct that an ostensibly temporary measure *might*, in fact, be so long lasting or indefinite in duration that it is a taking under *Lucas*. The courts are well equipped to look behind labels to find the substance of things. Thus, owners would certainly be entitled to allege, and courts might well find a taking, if a measure labeled as a "moratorium" actually were intended to last indefinitely, or if the government enacted a continuous series of short-term moratoria, effectively creating a single, permanent prohibition on development.

The problem for petitioners is that their characterizations of this case do not match the actual facts. In the early 1980's TRPA enacted a moratorium which (with several short, good-faith extensions) lasted less than three years, followed in 1984 by the enactment of a new regional plan (immediately enjoined by federal court), and in 1987 by the enactment of another regional plan. The 1987 plan differed from the prior 1984 plan and differed even more from the complete prohibition on development during the moratorium. *See Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 911 F.2d 1331, 1333 (9th Cir. 1990). In place of the prior, flat prohibition on development, the 1987 plan (much like the 1984 plan) provided a series of flexible alternatives for landowners, including the opportunity to develop certain lots, *see, e.g., Kelly v. Tahoe Regional Planning*

Agency, 855 P.2d 1027 (Nev. 1993); to sell transferable development rights, *see, e.g., Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); and to sell the fee to the government, *see, e.g., Carpenter v. Tahoe Regional Planning Agency*, 804 F.Supp. 1316 (D. Nev. 1992). To be sure, various aspects of the 1987 plan were or might be subject to a possible claim under the Takings Clause or to some other legal challenge. The point for the purpose of *this* takings case, however, is that the 1987 plan (and the 1984 plan) cannot remotely be described, in substance, as a simple extension of the earlier moratorium.[4]

"Arbitrary" Moratoria. The second type of legal concern which a planning moratorium might raise is that, quite apart from its duration, it is somehow arbitrary or otherwise invalid. For example, a moratorium might be designed to address a nonexistent or trivial planning concern, local officials might have no intention of using the moratorium period to address the problem, or government officials might be motivated by improper animus toward some individual or group. This type of concern can raise a potential constitutional issue, but one that logically falls under due process (or possibly equal protection), not takings. *Cf. Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998).

The Court has suggested on occasion that a government action "effects a taking" if it "does not substantially

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[4] The district court resolved the question whether the 1987 plan represented a new regulatory regime or was a mere continuation of the prior moratorium in the context of addressing TRPA's statute of limitations defense, and this Court declined to grant certiorari on the statute of limitations issue.

advance legitimate state interests." *Agins v. City of Tiburon*, 447 U.S. at 260. An arbitrary or unreasonable moratorium, it might be said, should be held to be a taking because it fails to advance a legitimate government interest. The petitioners do not, of course, rely on this argument; indeed they positively disavowed this theory, apparently recognizing that TRPA's efforts to save Lake Tahoe unquestionably advanced a legitimate public interest. *See* Plaintiffs' Motion in Limine and for Order Precluding Admission of Anticipated Testimony and Documents, filed October 29, 1998. The larger point, however, is whether this test can apply in *any* takings case.

Today there is a real question whether this ostensible takings test exists at all. The Court has never explicitly applied this test to support the conclusion that a regulatory use restriction effects a taking. *Cf. City of Monterey v. Del Monte Dunes Ltd.*, 526 U.S. 687 (1999) (upholding a jury verdict based in part on the *Agins* test, where the municipality waived any objection to the jury instructions). In recent decisions, seven justices have either stated, or joined in opinions stating, that the legitimacy of this ostensible takings test is, at a minimum, an open question. *See Del Monte Dunes Ltd.*, 526 U.S. at 732 n.2 (Scalia, J. concurring in part and concurring in the judgment); *see id.* at 753 n.12 (Souter, J., dissenting, joined by Justices O'Connor, Breyer, and Ginsburg); *Eastern Enterprises v. Apfel*, 524 U.S. 498, 545 (1998) (Kennedy, J. concurring in the judgment and dissenting in part).

In fact, this ostensible takings test does not involve a takings question. The Takings Clause, at bottom, is concerned, not with whether a governmental action can go

forward, but with whether the public must pay compensation as a condition of the government action. *See Preseault v. ICC*, 494 U.S. 1, 11-12 (1990). Thus, a viable taking claim presupposes that, apart from the absence of compensation, the government action serves a legitimate purpose and should be permitted to proceed. In Chief Justice Rhenquist's words, the Takings Clause "is designed . . . to secure compensation in the event of *otherwise proper* interference amounting to a taking." *First English*, 482 U.S. at 315 (emphasis added). If the government action is arbitrary or otherwise invalid, and should not proceed at all, it may well violate *some* provision of the Constitution, but it does not violate the Takings Clause. *See San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 656 n.23 (1981) (Brennan, J., dissenting), distinguishing a claim that an otherwise valid government action effects a taking from the "different case . . . where police power regulation is not enacted in furtherance of the public health, safety, morals, or general welfare." In the latter situation Justice Brennan said, "the government entity may not be forced to pay just compensation under the Fifth Amendment," but the owner may "nonetheless have a damage cause of action under 42 U.S.C. 1983 for a Fourteenth Amendment due process violation." *Id.*

The conclusion that the "substantially advance" test is not a legitimate takings test is also supported by the historical record, which shows that the *Agins* Court introduced this test into takings doctrine as a result of a mistaken muddling of due process and takings concepts. The precedent which the *Agins* Court cited to support this ostensible takings test, *Nectow v. City of Cambridge*, 277

U.S. 183 (1928), was unambiguously decided under the Due Process Clause, as was the leading precedent upon which the *Nectow* court relied, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). *See generally* Jerold Kayden, "Land Use Regulations, Rationality, and Judicial Review: the RSVP in the Nollan Invitation," 23 *Urban Lawyer* 301, 314-16 (1991).

As discussed, the conclusion that the "substantially advance" test is not a legitimate takings test does not mean that an owner cannot bring a constitutional challenge to an arbitrary or otherwise invalid moratorium. In fact, if property owners resort to the Due Process Clause, they will find entirely hospitable legal ground. *See, e.g., Lockary v. Kayfetz*, 917 F.2d 1150 (9th Cir. 1990) (material issues of fact existed as to whether moratorium on new water hookups violated substantive due process when there was evidence that no water shortage existed); *Q.L. Const. Co., Inc. v. Gallo*, 649 F. Supp. 1331 (D.R.I. 1986), *aff'd*, 836 F.2d 1340 (1st Cir. 1987) (finding due process violation where city imposed moratorium on sewer hookups but made no effort to remedy problem giving rise to moratorium); *Mitchell v. Kemp*, 575 N.Y.S.2d 337 (N.Y.App. Div. 1991) (holding that moratorium effected an apparent due process violation when municipality gave no satisfactory reason for five-year delay in enacting zoning ordinance). In short, there is no need to stretch takings jurisprudence beyond its logical limits to address every type of unreasonable burden moratoria place on land owners.[5]

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[5] The length of a moratorium may or may not be an issue in a challenge brought under the Due Process Clause. An

Stepping back, it is instructive to consider why advocates might seek to shoehorn due process issues into takings doctrine. According to their viewpoint, traditional review under the Due Process Clause is too deferential, and reframing substantive due process questions as taking issues, they hope, provides an opportunity for more searching judicial review of regulatory statutes. These criticisms of the Court's substantive due process doctrine may, or may not, provide fair ground for debate. But it is a question properly addressed in a Due Process case. The proper response cannot be to invent a searching facsimile of substantive due process review under the Takings Clause, where it does not and will not fit.

In addition, advocates for land owners have an incentive to seek to expand takings doctrine in this fashion because it would give owners the option of obtaining relatively generous "just compensation" awards (based on estimated market value for sale or rental), even if they have suffered no actual economic injury. *Cf. Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.*, 640 So.2d 541 (Fla. 1994) (rejecting plaintiffs' effort to recast a due process issue as a taking issue in order to avoid conferring windfalls on undeserving owners). This potential problem is a very real issue in a case involving a moratorium, where many landowners who sell or develop their property after the end of the moratorium

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excessively long moratorium would likely be strong evidence that the government is not acting reasonably to advance a legitimate governmental interest. On the other hand, even a very short moratorium would constitute a due process violation if it had no legitimate justification to begin with.

may suffer no economic injury whatsoever. By contrast, confining actual due process claims to the Due Process Clause would require claimants to show their actual damages, if any. A judicial innovation designed to confer private windfalls at public expense has absolutely nothing to recommend it as a matter of constitutional principle.

B. There is No Separate, Coherent *Penn Central* Taking Test.

As discussed in Section I, unless the Court were to take the revolutionary step of jettisoning the parcel as a whole rule, petitioners' *Lucas* claim must fail. Because the *Lucas* claim is the *only* claim that petitioners have pursued in this case, it would be inappropriate for the Court to consider how a possible claim under *Penn Central* might have fared in this case. However, if a *Penn Central* claim were at issue in this case, it would be important to address the problematic nature of such a claim. The factors originally enumerated in *Penn Central* remain central to regulatory takings doctrine. But, especially in light of subsequent evolutionary developments in the Court's takings jurisprudence, there is today no coherent, independent *Penn Central* "test" to apply.

In *Penn Central*, one of the Court's first efforts to put some flesh on the bones of regulatory takings doctrine, the Court said: "The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action." *Id.* at

124. While this language is sometimes said to have established a distinct *Penn Central* "test," it is doubtful that the *Penn Central* Court actually intended for this language to lay the foundation for a determinative test. The Court observed that defining a regulatory taking was "a problem of considerable difficulty," *id.* at 123, and acknowledged that it had no " 'set formula' for determining when 'justice and fairness' require" payment of compensation. *Id* at 124. The Court simply offered these three factors as having "particular significance" in what were, at the time, "essentially ad hoc, factual inquiries." *Id.*

Over the subsequent twenty-five years, the Court has significantly refined its treatment of the *Penn Central* factors, converting several of them into determinative tests. This process of refinement has, in effect, superseded the *Penn Central* factors; indeed, *no* litigant before the Court has *ever* successfully invoked the *Penn Central* test, except when some special feature (total economic loss, physical occupation) justified categorical treatment of the claim. *See District Intown Properties Limited Partnership v. District of Columbia*, 198 F.3d 874, 886 (D.C. Cir. 1999), *cert. denied*, 531 U.S. 812 (2000) (Williams, J., concurring) (offering the same reading of Supreme Court precedent). When a constitutional test supposedly exists, but is never used to support a finding of a constitutional infringement, decade after decade, the question naturally arises whether the test really does exist.

Upon careful analysis, it is clear that the *Penn Central* multi-factor analysis has little, if any, contemporary relevance. The *Penn Central* "test" has been thought to involve two distinct factors, in addition to the traditional

inquiry into economic impact: "character" and "investment expectations." In fact, neither factor helps demarcate a separate, coherent test for a regulatory taking.[6]

In mentioning the "character " of the government action, the *Penn Central* Court clearly was referring to whether a "physical occupation by government" was involved. *See* 438 U.S. at 124. Four years later in *Loretto*, however, the Court established a categorical taking rule for permanent physical occupations, robbing the character factor of most if not all of its meaning as a single factor in the multi-factor balancing test. Some lower courts have attempted to breathe new life into the "character" factor by interpreting it as referring to the value or importance of the public goal served by the regulation. This reinterpretation of the "character" factor is ultimately nonsensical. As the Court made crystal clear in *First English*, regulatory takings doctrine flows from and is governed by the same basic principles which govern exercises of the power of eminent domain generally. *See* 482 U.S. at 314. When the government seizes property by eminent domain, say for a road, it cannot be argued that the government has no obligation to pay compensation because the road addresses a "serious" or "important"

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[6] Academics from all ideological perspectives have criticized the *Penn Central* test. *Compare* Richard Lazarus, "Putting the Correct 'Spin' on Lucas," 45 *Stanford L.Rev.* 1411, 1429 (1993) (referring to "the unprincipled vagaries of the multifaceted balancing test prescribed by Penn Central") *with* Richard Epstein, "Property, Speech, and Politics of Distrust," 59 *U.Chi.L.Rev.* 41 (1992) (asserting that "the Supreme Court has positively gloried in its inability to articulate clear rules to govern this area," citing *Penn Central*).

public transportation problem. Similarly, in the regulatory takings context, it would make no sense to conclude that the importance of the police power objective being pursued should weigh against a finding of a compensable taking.[7]

The "expectations" factor also does not demarcate a distinctive *Penn Central* test. In *Palazzolo v. Rhode Island*, 121 S.Ct. 2448 (2001), the Court ruled that an owner's preacquisition notice of a restriction does not automatically bar a taking claim. But a majority of the Court indicated equally clear agreement that preacquisition notice, and an owner's investment expectations generally, are a relevant *factor* in takings analysis. *See id.* at 2465; *id.* at 2471 n.6; *id.* at 2477 & n.3. Furthermore, the Court apparently recognized that investment expectations should be relevant in a *Lucas* case specifically, at least in some circumstances. *See id.* at 2457, citing *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring) (stating that an owner's "investment expectations" are relevant in evaluating a *Lucas* "total taking" claim); *see also id.* 2477 (Breyer, J, dissenting).

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[7] The argument that there should be *no* finding of a taking because the government is pursuing a legitimate and important public purpose is simply the mirror image of the argument that there *should be* a finding of a taking because a government action fails to advance a legitimate government interest. *See* pp. 14-17, *supra*. The conclusion that a "substantially advance" claim does not involve a taking issue supports and reinforces the conclusion that "character," defined as the value or importance of the government's action, is not a relevant factor in takings analysis.

Real world examples confirm the intuitively compelling conclusion that investment expectations *must* be relevant in some *Lucas*-type cases.. For example, following the Court's decision in *Palazzolo*, could Mr. Palazzolo have sold off his restricted wetland acres to a new corporation and could the corporation then have sued under *Lucas*, thereby allowing Mr. Palazzolo to profit from a claim on which he otherwise might well not have prevailed? The idea seems preposterous. If that were the law, every owner could manufacture a claim with respect to any regulated sliver of his property.

This extreme result would achieve indirectly precisely what petitioners seek in this case – the elimination of the parcel as a whole rule. If a purchaser's pre-acquisition notice could be completely disregarded in a *Lucas*-type claim, then any owner could evade the parcel as a whole rule by subdividing the property into usable and unusable portions or interests. But assuming the Court is unwilling to take the radical step of jettisoning the parcel as a whole rule, the Court must reject a position on expectations which would allow owners to achieve the same end through the back door. Because, under this analysis, investment expectations must be at least a potentially relevant factor in a *Lucas*-type case, the expectations factor does not serve to demarcate a distinctive, separate *Penn Central* test either.

In sum, the "character" factor (as recently reinterpreted, to focus on the value or importance of the government action) is essentially meaningless in *all* takings cases, and the "investment expectations" factor is potentially meaningful in *all* takings cases. As a result, while all of the *Penn Central* "factors" remain relevant in

takings analysis, there is no coherent, independent *Penn Central* test left to apply.[8]

III. The "Political Process" Arguments for the Proposed Rewrite of the Takings Clause Are Incoherent in Theory and Wrong as a Matter of Fact.

Scattered among the legal arguments by petitioners and their *amici* for a more "robust" law of regulatory takings are a series of assertions and assumptions, many rooted in a simplistic law and economics analysis, designed to support the conclusion that a more expansive rule of takings liability would represent a positive reform. Because many of these assertions and assumptions are demonstrably wrong, or at least highly problematic, a brief response may be helpful to the Court.

Judicial Protection for Minority Interests. One pervasive theme in the briefs of petitioners and their *amici* is that property owners, because they may be relatively few in number, lack the political power to protect their interests in the political process. According to this view, the Court should place its interpretive thumb on the scales of justice on behalf of property owners in much the same way as the Court in the past extended protection for racial

[8] The conclusion that *Penn Central* does not provide a separate, coherent takings test does not, of course, directly answer whether a regulatory use restriction which does not fall under the "categorical" *Lucas* rule may still result in a taking under some circumstances. *But cf. Concrete Pipe*, 508 U.S. at 645 ("our cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking").

minorities and other disfavored groups. *Cf. United States v. Carolene Products Co.*, 304 U.S. 144, 149 n.2 (1938).

This argument is based on a simplistic and flawed premise. Property owners, simply because they often represent a minority interest, are not disadvantaged in the political process. In fact, property owners find it relatively easy to organize themselves into a cohesive and effective political force, in part precisely because they are relatively few in number, and also because they tend to be relatively well heeled and have significant monetary stakes in the issues. As a result, property owners and allied groups, such as developers and resource companies, represent highly effective political actors at the local, state, and national levels. By contrast, because virtually all citizens share an interest in protecting the environment, environmental advocates are a relatively difficult interest group to organize into an effective political force. *See generally* Mancur Olson, *The Logic of Collective Action* (1965).

Many of the *amici* supporting petitioners are in a poor position to argue for an expansive reading of the Takings Clause in order to protect property owners from the allegedly unfair results of the political process. For example, *amicus* American Farm Bureau Federation and many of its supporters and allies succeeded just a few weeks ago in persuading the House of Representatives to pass major new farm legislation that would *increase* farm subsidy levels by over $70 billion over 10 years. *See* Statement by Office of Management and Budget, October 3, 2001, www.whitehouse.gov/omb/legislative/sap/107-1/HR2624. The real estate development industry, which is also heavily represented in this case, has

successfully lobbied for favorable treatment under the tax code and many other federal and state laws. Landowners and developers are equally potent political forces at the state and local level.

Turning to this case, petitioner Tahoe Sierra Reservation Council, which describes itself as "a membership organization representing approximately 2,000 dues-paying members," *see* Joint Appendix at 22, has been an active and effective force, both through paid staff and outside legal counsel, in every facet of the TRPA planning process, as well as in proceedings before the state legislatures of the Compact States relating to the Lake Tahoe planning effort. While TRPA did not win every issue, it had a great deal of input into the 1987 plan, which contains many provisions that protect property owners' economic interests. Thus, TSPC is hardly a poster child for a revolution in takings law.

Internalizing Regulatory Costs. Another pervasive argument in the *amici* briefs is the notion that an expansive doctrine of regulatory takings is necessary and appropriate to force government to "internalize" the costs of its decisions. According to this view, regulatory activity inevitably generates costs, but government officials have no natural incentive to control these costs so long as they are laid off on third parties, such as property owners. A broad takings compensation rule, the argument continues, would force government to take these costs into account.

First, the premise of this argument is often wrong or at least questionable, because land use controls, which are designed to advance the welfare of the community as

a whole, often help increase property values. In the case of a moratorium which simply defers development, there is no *a priori* reason to think that the restriction necessarily has *any* adverse economic impact. Many owners in the Tahoe basin apparently did as well or better financially on their property investments as they would have fared in the absence of the moratorium.

Second, to the extent regulations of some kinds do produce costs, the cost internalization argument suffers from a fatal asymmetry. *See* Darryl J. Levinson, "Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs," 67 *U.Chi.L.Rev.* 345, 349-50 (2000). A full and accurate accounting would have to take into account both the costs and benefits of government action. But, unlike the situation with a private firm, which derives profits from goods and services sold to the public, government officials cannot tote up the direct benefits of their actions on any public ledger. If all the "costs" of government actions were internalized (through an expanded regulatory takings doctrine), while the benefits necessarily remained off budget, officials would systematically err in favor of property owners and against other interests. The quality of our environment would be undermined and, in economic terms, total social welfare would not be maximized.

Takings Liability as a Mere Condition. Yet another recurring argument is that the Court should have little concern about embracing an expansive view of regulatory takings doctrine because a finding of a taking does not result in a judicial injunction preventing the government from acting, but, instead, "merely" places a "condition" on the action – payment of compensation.

This argument has it exactly backwards. As a result of the Court's *First English* ruling, if a local government turns out to be wrong in its good faith belief that a regulatory action is not a taking, the government is compelled to pay compensation for the period the restriction was in place. An assessment of financial liability – and more importantly, the risk of financial liability whenever government attempts to regulate – creates a far more serious interference with the government's decision-making authority than the possibility of an injunction. This is especially true given the general unavailability of municipal liability insurance to cover regulatory takings awards.[9]

There is also a heavy dose of cynicism underlying this argument. Counsel for TSPC, who also served as counsel for plaintiffs in the *First English* case before this Court, argued for a mandatory compensation remedy in *First English* on the ground that an injunctive remedy would be relatively ineffectual, as compared to a compensation remedy, in influencing local government laws and polices. *See First English*, Brief for Petitioners, at 25-32.

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[9] The impact of compensation awards at the state level is more uncertain, mostly because it remains unclear whether state governments are immune from financial liability under the Takings Clause based on sovereign immunity. *See Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency*, 938 F.2d 153 (9th Cir. 1991) (dismissing claims against California and Nevada dismissed based on sovereign immunity). In the case of the federal government, which has waived its sovereign immunity against takings claims, *see* 28 U.S.C. § 1491, and which pays takings awards out of the Judgment Fund, *see* 31 U.S.C. § 1304, takings awards could be described somewhat more plausibly as imposing a "mere condition" on law making.

Given that their counsel succeeded in persuading the Court on the need for a compensation remedy in order to constrain local government authority, *see* 482 U.S. 304, 317, 321, it is surprising to discover TSPC now describing compensation as a relatively mild remedy as compared to the "judicial second guessing of governmental policies and decisions through disruptive injunctions." Brief for Petitioners at 42.

CONCLUSION

The Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

JOHN D. ECHEVERRIA
ENVIRONMENTAL POLICY PROJECT
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9850

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